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CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ALI A. AZIMA, M.D., PETITIONER,

v.

FLORIDA DEPARTMENT OF
PROFESSIONAL REGULATION,
BOARD OF MEDICAL EXAMINERS,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOR THE FIRST DISTRICT OF FLORIDA

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QUESTIONS PRESENTED

1. Whether Section 458.331(1)(t), Florida Statutes, is violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution because it is so vague that it fails to provide physicians with adequate notice of what medical malpractice standards will be applied in administrative proceedings to determine whether a medical license may be suspended.

2. Whether a statute which authorizes a state administrative agency to revoke a physician's license to practice medicine comports with the due process provision of the Fourteenth Amendment to the United States Constitution when that statute requires only that, as a threshold standard of proof, there exist some competent substantial evidence of a violation and the level of that competent substantial evidence is not substantially

greater than that required to support conventional administrative action.

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PETITION FOR WRIT OF CERTIORARI
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The Petitioner, ALI A. AZIMA, M.D., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the District Court of Appeal for the First District of Florida entered in his case on July 15, 1985.

OPINION BELOW

The opinion of the District Court of Appeal for the First District of Florida appears in the appendix hereto. The record of the Board of Medical Examiners and the record of the hearing are not included.

JURISDICTION

The judgment of the First District Court of Appeal of Florida, which affirmed the final order issued by the Florida Board of Medical Examiners suspending Petitioner's medical license, was entered on July 15, 1985. Petitioner sought a rehearing which was denied on August 26, 1985. Petitioner then timely filed his notice to invoke discretionary jurisdiction of the Florida Supreme Court on September 23, 1985. On January 24, 1986, the Supreme Court of Florida denied certiorari and refused to entertain a motion for rehearing. This Petition for Writ of Certio-

rari was filed within ninety (90) days of that date as required by Rule 20 of the Revised Rules of the Supreme Court of the United States and 28 U.S.C. §2101(c).

STATEMENT OF THE CASE

A. Summary of Findings and Recommendations

This petition arises from the suspension of Petitioner's medical license by the Florida Board of Medical Examiners and Department of Professional Regulation, based upon a finding that his treatment of three patients violated §458.331(1)(t), Florida Statutes, which authorizes such suspension for medical malpractice.

On February 7 and 8, 1984, an administrative hearing was held in Ft. Myers, Florida, before Diane D. Tremor, Hearing Officer for the Florida Department of Administrative Hearings. On July 24, 1984, Ms. Tremor submitted a Recommended Order to the Board of Medical Examiners (hereinafter "BOME") in which Hearing Officer Tremor found Respondent/Petitioner's (hereinafter "Petitioner") treatment of three patients to be in viola-

tion of §458.331(1)(t), Fla. Stat., and concluded that such treatment constituted medical malpractice. She recommended a one-year suspension of Petitioner's medical license.

A short hearing was conducted before the BOME on December 1, 1984, in which the Board adopted the Hearing Officer's findings of fact and conclusions of law in toto. The BOME increased the recommended penalty and specifically ordered that:

> 1. Respondent's license to practice medicine in Florida shall be suspended for a period of one year, with the specific provision that in six months Respondent may request that the Board stay the second six months of the suspension.
>
> 2. Upon the termination or stay of the suspension, Respondent's license to practice medicine in Florida shall be placed on probation for a period of three years, subject to the term and condition that Respondent make

semi-annual appearances before the Board.

3. During the periods of suspension and probation, Respondent shall earn fifty (50) hours of Category 1 continuing medical education annually.

[R. 750, 751].

B. Summary of Issues

By administrative complaints filed on March 15, 1983 (Case No. 83-1205) and August 2, 1983 (Case No. 83-2589), the Department of Professional Regulation (hereinafter "DPR") charged ALI A. AZIMA, M.D., with violating §458.331(1)(t), Fla. Stat., with regard to his medical treatment of five patients. The Complaint filed on March 15 contained four counts and related to patients Christine Ann Sellers (now Christine Kuchar) (Count I), Holli Schmidt (Count II), Coleen Lundy (Count III), and Kathy Holloway (Count IV). The Complaint filed on August 2, 1983, contained

two counts, both of which related to patient Darlene Baker.

Count IV of the Complaint filed on March 15, 1983, and Count II of the Complaint filed on August 2, 1983, were voluntarily dismissed, with prejudice, at the commencement of the final hearing. Therefore, only the first three counts of the March 15 Complaint and Count I of the August 2 Complaint were considered by the Hearing Officer and the BOME.

Issues

Based on Count I of the Complaint filed on March 15, 1983, the Hearing Officer found that in performing a termination of pregnancy procedure on Christine Sellers Kuchar (hereinafter "Kuchar"), Petitioner violated §458.331(1)(t), Florida Statutes, because he failed to obtain a patient medical history, including a determination of the

patient's Rh factor, and failed to send the tissue specimen to a pathologist.

Count II of the March 15, 1983, Complaint charged that with respect to patient Holli Schmidt, Petitioner negligently inserted an intrauterine contraceptive device (IUD) when she was twelve weeks pregnant, failed to take vital signs, failed to perform blood work and that on two subsequent occasions counseled her without performing any examination to ensure that she was not pregnant.

The Hearing Officer concluded that the evidence did not establish that the taking of vital signs or the performance of blood work were necessary prior to the insertion of an IUD, or that the patient was twelve weeks pregnant when she last saw the Petitioner. The Hearing Officer did, however, find that Petitioner, in violation of §458.331(1)(t), Fla. Stat., inserted an IUD

into patient Schmidt without taking adequate precautions to ensure that the patient was not pregnant at the time of insertion.

Petitioner was found not guilty of the allegations contained in Count III of the March 15, 1983, Complaint. Count IV of the same Complaint was voluntarily dismissed.

As to Count I of the Complaint filed on August 2, 1983, the Hearing Officer determined that in performing a termination of pregnancy procedure on patient Darlene Baker, Petitioner violated §458.331(1)(t), Fla. Stat., by failing to send the tissue specimen to a pathologist for evaluation. Count II of this Complaint was voluntarily dismissed.

In summary, it was found that Petitioner's conduct constituted the commission of "gross or repeated malpractice or the failure to practice medicine with that level of care, skill and treatment which is recognized

by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances." §458.331(1)(t), Fla. Stat. This finding was based on the Hearing Officer's conclusions that Petitioner failed to send tissue specimens to a pathologist for examination after performing termination of pregnancy procedures on patients Kuchar and Baker, failed to determine the Rh factor of patient Kuchar, and did insert an IUD into patient Schmidt without taking adequate precautions to ensure that she was not pregnant at the time of insertion. The remaining charges in the two Complaints were either dismissed or were insufficiently established by competent substantial evidence. (R. 700-703).

In support of the findings against Petitioner, the DPR presented the testimony of patients Baker and Kuchar; Drs. Constantine Yankopolus, Randall Paul Cowdin, and

Philip F. Waterman, II, each of whom practice together in the same office in Fort Myers, Florida, and each of whom are in direct competition with the Women's Health Clinic operated by Petitioner. The DPR also put on Dr. Craig B. Sibley, who also practices in Fort Myers, Florida, and is a direct competitor of Petitioner's Women's Health Clinic. All of the expert medical witnesses who testified against Petitioner treated one or more of the complaining patients. The DPR also presented the testimony of Theodore M. Purcell, an investigator for the DPR.

The crux of Petitioner's position is that all of the testimony elicited at the hearing established that his procedures were in full compliance with the published American College of Obstetrics and Gynecology (hereinafter "OB/GYN") standards. There is absolutely no testimony that Petitioner viola-

ted or fell below any published or uniformly recognized standards. The testimony at best established that his practices and procedures, while admittedly meeting the published standards, fell below medical standards established solely by the testimony of four physicians, all of whom were direct competitors of Petitioner's Women's Health Clinic.

Petitioner testified on his own behalf. He also presented the testimony of George Chiu, the Director of Medical Information at Fort Myers Community Hospital, and Anne Wilke, the Executive Secretary for the Lee County Medical Association.

The DPR's Exhibits A through D and F through H were received into evidence as well as Petitioner's Exhibits 1, 2 and 3.

Petitioner refers the Court to Section V of the Appendix which contains a summary of facts material to this Court's consid-

eration of the questions presented. In this summary, Petitioner has attempted to present portions of the record in an objective manner in order to demonstrate that Petitioner had no prior notice of the medical standards by which it was held that he violated §438.331(1)(t), Fla. Stat., and to demonstrate that the DPR did not prove essential allegations of law and fact by a preponderance of competent substantial evidence.

Specifically, Petitioner contests findings that:

a. He was legally obligated to determine the Rh factor of Ms. Kuchar's blood;

b. He did not determine the Rh factor of Ms. Kuchar's blood; and

c. He was required by law to send the abortion tissue

> for a pathological examination when Petitioner, in accordance with the only standards of his profession which he could have been aware of, clearly determined through a detailed visual examination that fetal remains were present and the abortion was successful.

The federal questions presented for this Court's review were not raised until Petitioner's appeal from the final order of the BOME. This is because the state administrative agency had no jurisdiction to deal with constitutional issues. Both federal questions were presented for the first time in Petitioner's briefs to the District Court of Appeal for the First District of Florida. Pertinent quotations from specific portions

of Petitioner's briefs, showing that the federal questions were timely and properly raised, are presented in Section IV of the Appendix. The District Court of Appeal did not pass directly on either constitutional issue.

If there remains uncertainty that each federal question was adequately raised before the state court, Petitioner refers this Court to his discussion of each reason for granting the writ. In that discussion, Petitioner presents reasons why this Court should not invoke the abstention doctrine.

REASONS FOR GRANTING THE WRIT

I. SECTION 458.331(1)(t), FLA. STAT., IS UNCONSTITUTIONAL BECAUSE IT LACKS REASONABLY CLEAR GUIDELINES SO AS TO PREVENT OFFICIAL ARBITRARINESS IN THE REVOCATION OF A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST AND HAS BEEN APPLIED IN A MANNER WHICH IS SO VAGUE THAT IT DENIED PETITIONER ADEQUATE NOTICE OF THE STANDARDS FOR ENFORCEMENT.

This Court has stated that "perhaps the most important factor affecting the clarity that the constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." Village of Hoffman Est. v. Flipside, Hoffman Est., 455 U.S. 489, 499, 102 S.Ct. 1186, 1193 (1982).

Petitioner, as a physician licensed to practice medicine by the State of Florida, holds a sufficient claim of entitlement to his license to invoke the protection of the due process clause because that license can

only be suspended upon a satisfactory showing that he has committed an act in violation of §458.331, Fla. Stat. Barry v. Barchi, 443 U.S. 55, 64, 99 S.Ct. 2642, 2649 (1979); Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972).

Florida law has provided Petitioner with a property interest in his license because revocation or other disciplinary action regarding his medical license is not discretionary. Rather, all disciplinary action taken by the DPR and the BOME against a medical license must occur pursuant to §458.331, Fla. Stat. See Barry v. Barchi, 443 U.S. 55 at 64, 99 S.Ct. 2642 at 2649.

Once a license is issued, as in Petitioner's case, its continued possession may become essential to the pursuit of a livelihood. The suspension of Dr. AZIMA's license

involves state action that adjudicates a most important interest of this licensee: employment in his medical profession. Bell v. Burson, 402 U.S. 535, 539, 91 S.Ct. 1586, 1589 (1971). Petitioner's constitutional protections provided by the fourteenth amendment limit the state's power to terminate this entitlement regardless of whether his interest is denominated a "right" or a "privilege." Id.

When a statute is challenged under the due process doctrine of vagueness, a court must determine: (1) whether the statute provides sufficient notice of what may not be done, and (2) whether it contains reasonably clear guidelines so as to prevent official arbitrariness or discrimination in its enforcement. Smith v. Goguen, 415 U.S. 566, 573, 94 S.Ct. 1242, 1247, 39 L.Ed.2d 605 (1974); Grayned v. City of Rockford, 408 U.S.

104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972); Intern. Soc. For Krishna Consc. v. Rochford, 585 F.2d 263, 269 (7th Cir. 1978).

Section 458.331, Fla. Stat., provides,[1] in part:

> (1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:
>
> * * *
>
> (t) Gross or repeated malpractice or the failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances. The board shall give great weight to the provisions of s. 768.45 when enforcing this paragraph. (Emphasis added).

---

[1]Both §458.331 and §768.45, Fla. Stat., were modified during 1985. See Section III of the Appendix for the fully revised text and an explanation of the changes.

Section 768.45, Fla. Stat., which governs civil standards for recovery in medical malpractice actions, provides in part:

> (1) In any action for recovery of damages based on the death or personal injury of any person in which it is alleged that such death or injury resulted from the negligence of a health care provider as defined in s. 768.50(2)(b), the claimant shall have the burden of proving by the greater weight of evidence that the alleged actions of the health care provider represented a breach of the accepted standard of care for that health care provider. The accepted standard of care for a given health care provider shall be that level of care, skill, and treatment which is recognized by a reasonably prudent similar health care provider as being acceptable under similar conditions and circumstances. (Emphasis added).
>
> * * *
>
> (2) (b) If the health care provider whose negligence is claimed to have created the cause of action is certified

> by the appropriate American board as a specialist, is trained and experienced in a medical specialty, or holds himself out as a specialist, a "similar health care provider" is one who:
>
> 1. Is trained and experienced in the same specialty; and
> 2. Is certified by the appropriate American board in the same specialty.

These interrelated statutory standards give a physician absolutely no warning, guidance or notice of what conduct will render him subject to administrative sanctions.

The constitutionality of a statute, with regard to vagueness or overbreadth is generally not considered by this Court in terms of the statute "on its face," but rather is reviewed within the context of specific conduct to which the statute has been applied. United States v. National Dairy Products Corp., 372 U.S. 29, 83 S.Ct. 594, 595

(1963). Recognizing that the speculative danger of arbitrary enforcement may not in and of itself render a statute void for vagueness, see Village of Hoffman Est. v. Flipside, Hoffman Est., 455 U.S. 457, 102 S.Ct. 1196; and Coates v. City of Cincinnati, 402 U.S. 611, 91 S.Ct. 1686 (1971), Petitioner is aggrieved because the application of the statutory standard to his conduct did violate his rights to due process. Murray v. Norberg, 423 F.Supp. 795, 801 (1976). "Vagueness ... ordinarily constitutes a violation of due process only where the aggrieved party can show that the statute ... fails to give adequate notice of some duty that government imposes...." Id.

This Court has consistently held that a limiting construction, by state courts, of what would otherwise constitute an unconstitutionally vague statute, can render the stat-

ute constitutional. Musser v. State of Utah, 333 U.S. 95, 68 S.Ct. 397 (1948). However, no limiting construction has been given to §458.331, Fla. Stat. Rather, in the case at bar the First District Court of Appeal affirmed a decision of the BOME which was founded upon a statute so lacking in reasonably clear guidelines that it fails to prevent official arbitrariness in enforcement or to put physicians on notice as to what conduct is proscribed or subject to discipline. Krishna v. Rochford at 269. In fact, the standards by which Petitioner was judged were contrary to his reasonable expectations. The unrefuted testimony is that Petitioner complied with all published American College of OB/GYN standards. The only standards which he failed to follow were those arbitrary standards established solely by the self-serving testimony of those doctors who provide his only competi-

tion and who do not share his opinion regarding the community benefits of a women's health clinic.

For example, Petitioner was specifically disciplined for his failure to send Ms. Kuchar's products of conception for a pathological analysis. This finding of guilt was based wholly upon expert witness testimony that all products of conception must be sent to pathology. (R. 232, 249, 271 and 278). Petitioner, however, testified that there was no need to send Ms. Kuchar's tissue for pathological analysis because fetal parts were readily recognizable, a fact which was in no way contradicted. (R. 428). Rather than contradict his factual testimony, the expert witnesses testified that regardless of whether fetal parts are recognized, all tissue must be submitted for pathological analysis. (R. 232, 249, 271 and 278). This expert tes-

timony, which established the standards under which Petitioner's license was suspended, was in direct conflict with the published American College of OB/GYN standards. (R. 232, 249, 271 and 278). Those standards provide in part as follows:

At page 52, the Standards reveal:

> In the situation of elective termination of pregnancy, the attending physician should record a description of the gross products. Unless definite embryonic or fetal parts can be identified, the products of elective interruptions of pregnancy must be submitted to a pathologist for gross and microscopic examination. (Emphasis added).

At page 54, under the heading "Abortion," the Standards specifically state:

> If villi or fetal parts are not identified with certainty, the tissue specimen must be sent for further pathologic examination, and the patient must be alerted to the possibility of ectopic pregnancy. (Emphasis added).

At page 66 of the Standards, under the heading "Gynecologic Surgery," is the following:

> Tissue removed should be submitted to a pathologist for examination. The patient should be informed of the tissue diagnosis. An exception to the practice may be in elective terminations of pregnancy in which definitive embryonic or fetal parts can be identified. In such instances, the physician should record a description of the gross products. Unless definite embryonic or fetal parts can be identified, the products of elective interruptions of pregnancy must be submitted to a pathologist for gross and microscopic examination. (Emphasis added).
>
> (R. 232, 278).

Standards for Obstetric-Gynecologic Services, American College of Obstetrics and Gynecologists (5th ed. 1982).

Given that there were, as per the Standards' dictates, recognizable fetal parts, Petitioner did not send those speci-

mens to pathology but, rather, disposed of them in a sanitary manner.[2] Petitioner performed all that was required of him by the

---

[2]All that is required by the Florida legislature is that fetal remains be disposed of in a sanitary and appropriate manner. Section 390.001, Fla. Stat., provides in part:

> (7) FETAL REMAINS.-- Fetal remains shall be disposed of in a sanitary and appropriate manner and in accordance with standard health practices, as provided by rule of the Department of Health and Rehabilitative Services....

The Department of Health and Rehabilitative Services' rules promulgated pursuant to §390.001, Fla. Stat., similarly require no more than disposal in a sanitary, nuisance free manner. Fla. Admin. Code, Rule 10D-72.16 provides:

> 10D-72.16 Disposal of Fetal Remains. All fetal remains shall be disposed of in a sanitary, nuisance free manner. Incineration or burial of such remains, as well as other nuisance free methods, are acceptable so long as the licensing agency is

FOOTNOTE CONTINUED ON NEXT PAGE.

American College of OB/GYN standards and Florida law.

When these standards are juxtaposed alongside the testimony of the doctors presented by the DPR as experts, the constitutional infirmity is laid bare:

Dr. Cowdin not only disagreed with the published standards on this matter, but went so far as to find the very standards which govern his profession to be below acceptable medical standards. He testified as follows:

> Q. I will read you the Standards for Obstetric-Gynecologic Services, published by the American College of Obstetricians and Gynecologists, Page 52: In the situation of elective termination of pregnan-

---

> assured that the disposal method utilized is nuisance free.

As such, Petitioner's procedures regarding termination of pregnancies is fully in compliance with §390.001, Fla. Stat.

cy, the attending physician should record a description of the gross products.

Now, you don't do that in all cases, right?

A. Correct.

Q. Unless definite embryonic or fetal parts can be identified, the products of conception must be submitted to a pathologist for gross and microscopic examination.

Do you agree with that?

A. No, I think all tissues should be submitted.

Q. So you disagree with those standards?

A. Correct, because whether or not there is embrionic [sic] tissue present does not rule out a concomitant hydatiform [sic] or a carcinoma.

Q. Do you think you or someone else has or should inform them of this?

A. I think it would be a good idea.

(R. 278)
(Emphasis added).

When Dr. Yankopolus was asked about the standards, this dialogue followed:

> Q. If a patient comes to see an OBGYN for the purpose of terminating a pregnancy and the pregnancy is in fact or the abortion procedure is performed and the products of conception are not forwarded to a pathologist for examination although the doctor has visually examined the products of conception, in your opinion would that doctor's treatment, medical treatment of that patient, fall below an acceptable standard of care?
>
> A. Absolutely.
>
> Q. Why is that?
>
> A. I don't feel that visual examination of tissue is adequate for the determination as to whether or not there are chorionic villi present. In certain cases the documentation of that requires microscopic examination by a trained pathologist.
>
> (R. 249).

Later during the hearing when the published OB/GYN standards were brought to his attention, Dr. Yankopolus responded as follows:

Q. What does it say; what does it say here?

A. 1981 Committee on Professional Standards.

Q. Now, can you look on Page 52. There is something underlined in yellow. Could you read it to the hearing officer?

A. In a situation of selective termination of pregnancy, a physician should record a description of the gross products definitely being identified as products of elective interruptions, and if not easily identifiable, they must be submitted to a pathologist for gross and microscopic examination.

Q. Does this say that you should record the gross examination? And you don't? Because you feel that you are not capable of doing this.

A. That's correct.

Q. Does this mean that you fall below the standards, Doctor?

A. In fact, I am above the standards.

Q. Above the standards? Okay.

(R. 232).
(Emphasis added).

While Dr. Yankopolus may choose to practice above the standards required by his profession, certainly Dr. AZIMA should not be denied his right to practice medicine for scrupulously following the published standards dictated by his profession.

Perhaps the most telling testimony of all came from Dr. Cowdin and it speaks directly to, and emphasizes, the arbitrary standards employed against Petitioner:

Q. Does the Lee County Medical Society have any standards that you know of?

A. With regards to what?

Q. Falling below the standard if the Rh factor is not determined by the doctor; sending the results to a pathology [sic]; taking the hemoglobin count. All of those things that you said if it wasn't done it falls below the standard; does the Lee County Medical Society have those standards?

A. As to whether or not they have them formally stated out, I am not certain.

Q. Why aren't you certain? You know they don't. Why are you alleging--

A. I think the standard of care, if I may so state, is something that is dictated by the practicing physicians in that community and the manners in which they practice their medicine.

Q. Do they tell each other, then, what they do?

A. Certainly.

Q. When did you tell Dr. Azima what your standards are?

A. I never have.

Q. When did he tell you what his standards are?

A. He never has.

Q. But that's how they are determined, by one doctor telling another; is that what you have testified to?

A. I think that's a reasonable statement.

Q. All right. Let's go on. You have stated that it falls below the standards if the remains of the abortion are not sent to pathology. I think we have established that about 10 times, right?

A. Right.

(R. 270-271).
(Emphasis added).

It was this testimony, and not the published American College of OB/GYN standards or any other reasonably objective standards, by which Petitioner was found guilty of violating §458.331(1)(t), Fla. Stat., and it is this arbitrary method of establishing standards of enforcement which renders §458.331(1)(t) violative of the Fourteenth Amendment to the United States Constitution.

The most disturbing factor regarding prosecutions under §458.331(1)(t), Fla. Stat., is that a doctor may be denied the right to practice medicine based on unwritten and uncodified standards. These standards may be established by a loosely assembled group of his ostensible peers who are his competitors or who may disagree with his political or societal views, e.g., the propriety of operating a women's health clinic. As such, medical licensees are put on no notice whatsoever regarding what conduct is prohibited. This leaves the DPR free to create and enforce standards which are developed at will, promulgated ad hoc, and enforced ex post facto. If a physician cannot be assured of the continued possession of his license by following to the letter the published standards of his profession, then no physician

can fully serve his profession, nor practice with confidence.

Petitioner was never provided any warning of the standards which were used to judge his medical practice. Government regulation cannot proscribe the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926); United States v. Professional Air Traffic Concrollers, 678 F.2d 1, 3 (1st Cir. 1982).

Petitioner has had a valuable property right taken from him for behavior which he could not reasonably understand to be proscribed and which he had no way of knowing constituted a violation of §458.331, Fla. Stat. (R. 369-421).

The standard which is required by §458.331(1)(t), Fla. Stat., is "that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances." Petitioner has demonstrated that his treatment of Christine Sellers, Holli Schmidt and Darlene Baker fully complied with the only recognized and published standards applicable to his specialty, i.e., those standards set by the American College of OB/GYN. (See Appendix Section V). But the Hearing Officer and the BOME, instead of relying on these published standards, relied solely upon the testimony of competitors to establish arbitrary standards, more stringent than those established by the American College of OB/GYN. Petitioner had no notice whatsoever of these arbitrary standards. (R. 692-708, 709-751).

It is evident from the record that Petitioner has had a valuable property right taken from him for behavior which he could not reasonably understand to be proscribed. The DPR presented expert testimony of four interested witnesses to establish a new standard of care, skill and treatment, which is above that set by the American College of Obstetrics and Gynecology; and the testimony of these same witnesses is so inconsistent as to cause great doubt that a reasonably prudent similar physician could be expected to recognize this new standard as the minimally acceptable standard of care, skill and treatment required by §458.331, Fla. Stat. (See Appendix Section V for a synopsis of the significant conflict among the experts regarding standards of medical practice).

This application of §458.331(1)(t), Fla. Stat., to Petitioner's practice clearly

violated the first essential of due process of the law because men of common intelligence differed in opinion as to its application. Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926); see also Aiello v. City of Wilmington, Delaware, 623 F.2d 845, 850 (3d Cir. 1980. (See Appendix Section V). The only relevant standards of practice which Petitioner had notice of were the written standards promulgated by the American College of OB/GYN and, therefore, these were the only standards by which Petitioner could determine "that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances." §458.331(1)(t), Fla. Stat. There was no testimony that Petitioner violated the written published standards; to the contrary, the

testimony revealed that he followed these standards scrupulously.

Because the DPR chose to apply new and arbitrary criteria which have never been published or otherwise communicated, the decision below is violative of Petitioner's due process rights. Diebold, Inc. v. Marshal, 585 F.2d 1327 (6th Cir. 1978). The statute in question has been applied in an arbitrary and otherwise constitutionally invalid manner. This vague application of the statute in question has resulted in an unconstitutional taking of Petitioner's property interests in violation of the Fourteenth Amendment to the United States Constitution.

If there remains doubt that Petitioner sufficiently presented this federal due process question before the state courts, Petitioner prays for the following reasons that this Court not invoke the abstention

doctrine. The statute in question is vague to individuals to whom it plainly applies because these licensees cannot understand what is required of them. Nor is it in the public interest that medical doctors foreswear all activity which is arguably within the scope of the statute's vague terms. Procunier v. Martinez, 416 U.S. 396, 94 S.Ct. 1800 (1974). The abstention doctrine is not appropriate because the statute is lacking in terms susceptible of objective measurement. Baggett v. Bullitt, 377 U.S. 362, 84 S.Ct. 1316 (1964).

II. THE DECISIONS BELOW ARE BASED ON A THRESHOLD STANDARD OF SUBSTANTIAL COMPETENT EVIDENCE, WHICH STANDARD IS VIOLATIVE OF PETITIONER'S RIGHT TO DUE PROCESS BECAUSE IT HAS RESULTED IN THE SUSPENSION OF HIS PROFESSIONAL MEDICAL LICENSE IN THE ABSENCE OF THE MINIMALLY SUFFICIENT QUANTUM OF PROOF NECESSARY UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

As noted above, the continued possession of Petitioner's medical license is essential to his livelihood such that a suspension of that license is an adjudication of a valuable and important interest. (See p. 7, infra). Any suspension of Petitioner's license must be in accord with the procedural due process required by the Fourteenth Amendment of the United States Constitution. Barry v. Barchi, 443 U.S. 55, 99 S.Ct. 2642 (1979).

For the administrative adjudication of rights, the State of Florida utilizes a vague, "sliding scale" standard of substan-

tial competent evidence, §§120.57(1)(b)(9) and 120.68(10), Fla. Stat.,[3] which requires that a licensee's violation be proven "by evidence which weighs as 'substantially' on a scale suitable for evidence as the penalty does on the scale of penalties." Bowling v. Department of Insurance, 394 So.2d 165, 172 (Fla. 1st DCA 1981). Notwithstanding the artful nature of this analogy, it is a subjective standard whose threshold requirements are not commensurate with the protections afforded Petitioner's property rights under the fourteenth amendment. In adopting this standard of substantial competent evidence, the State of Florida has retreated from the higher standard of "clear and convincing proof" which was applied in license revoca-

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[3]§§120.57 and 120.68, Fla. Stat., are relevant portions of the Florida Administrative Procedure Act and have been reproduced in Section III of the Appendix.

tion proceedings prior to the adoption of the Florida Administrative Procedure Act. See Bowling v. Department of Insurance, supra, at 171; see also Reid v. Florida Real Estate Commission, 188 So.2d 846, 851 (Fla. 2d DCA 1966).

The deficiencies of this vague evidentiary standard have not been remedied by the courts of Florida. The Bowling court acknowledged that when a proceeding may result in the loss of a professional license, "the critical matters in issue must be shown by evidence which is indubitably as 'substantial' as the consequences," Bowling, supra, at 172, but that court's allegiance to the due process standard was not put to the test under the facts in Bowling. In cases which do not envelop due process questions of constitutional proportion, the courts of Florida have recited Justice Frankfurter's statement

made in Universal Camera Corp. v. NLRB, 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456, 467 (1951):

> The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. See Bowling at 172 and McDonald v. Department of Banking and Finance, 346 So.2d 569, 579 (Fla. 1st DCA 1977).

But, as noted by Professor Kenneth C. Davis, "[T]he plain reality is that the substantial evidence rule as the courts apply it is a variable." 4 Administrative Law Treatise, sec. 29.02, p. 126.

Petitioner contends that essential proof of guilt must be established by more than mere substantial competent evidence before his license can be taken by an administrative board. The case at bar is distinguishable from other Florida appellate holdings which, under Florida's substantial competent evidence standard, have resulted in the

reversal of similar license revocations. See Boyette v. State, Professional Practices Council, 346 So.2d 598, 599-560 (Fla. 1st DCA 1977), where an administrative order revoking a teacher's certificate was held to be unsupported by substantial competent evidence because it was determined that the order was not even supported by a preponderance of the evidence. In Robinson v. Florida Board of Dentistry, 477 So.2d 930 (Fla. 3d DCA 1984), a license suspension was reversed upon a finding that "[o]ne professional's opposing opinion, without more, on a particular treatment is neither substantial competent evidence nor a measure of 'generally prevailing peer performance.' Cf. §466.028(1)(y), Fla. Stat." Id. at 932.

The issues raised by both Boyette and Robinson are distinguishable from the issue raised herein by Petitioner. Both the

Boyette and Robinson courts merely addressed whether there was a clear preponderance of evidence upon which to support a license revocation. While Petitioner also denies that his license revocation was supported by a preponderance of evidence, the issue he raises here is that the vague standard of competent substantial evidence, which was applied to Petitioner's license revocation proceedings, does not satisfy procedural due process requirements.

This precise issue was presented in Peden v. State Board of Funeral Directors and Embalm., 189 So.2d 526, 527-529 (Fla. 3d DCA 1966), but the reviewing court refused to address it.[4]

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[4]In his concurring opinion to the Peden case, Justice Carroll suggested that in a license revocation proceeding, due process requires at a minimum "that such charges must be proved by a preponderance of the evidence." Id. at 529.

Petitioner contends that under Florida law, the standard requiring some substantial competent evidence as a predicate to license revocation by an administrative board, is a vague standard which does not satisfy constitutional requirements of due process. This Court's earlier holdings which deal with licenses, property interests and individual rights suggest that the evidence against Petitioner must be so clear, strong, and unequivocal as to remove reasonable doubt as to the guilt of the Petitioner. Bell v. Burson, supra, 91 S.Ct. 1586 at 1589-1590, 402 U.S. 535 at 539-441 (driver license revocation); Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976) (revocation of Social Security benefits); Kramer v. Santosky, 102 S.Ct. 1388, 455 U.S. 745, 71 L.Ed.2d 599 (1982) (revocation of parental interests in natural child). In contrast, the subjective

standard, calling only for some competent substantial evidence to support penal sanctions against Petitioner, borders on the same criteria applied in ordinary civil proceedings and amounts to a taking of an important interest based on little more than a preponderance of the evidence.

Petitioner contends that this federal due process question has been sufficiently presented before the state courts. The due process implications of this vague "sliding scale" standard of evidence have also been presented in Peden, supra. Therefore, the state courts have been given an opportunity to vindicate the federal claim.

Furthermore, abstention is not to be ordered unless the state statute is of an uncertain nature and subject to a limiting construction. Zwickler v. Koota, 389 U.S.

241, 251, 88 S.Ct. 391, 397 (1967); Harman v. Forssenius, 380 U.S. 528, 534, 85 S.Ct. 1177, 1181 (1965). The applicability of the statute challenged herein, however, is not uncertain, Lake Carriers' Association v. MacMullan, 406 U.S. 498, 511, 92 S.Ct. 1749, 1757-1758 (1972), because the state courts have interpreted this statute. Yet, the Florida judiciary has not construed the statute in a manner which avoids in whole or in part the federal constitutional infirmity. Bellotti v. Baird, 428 U.S. 132, 132-133, 96 S.Ct. 2857, 2859 (1976). Furthermore, the vagueness claim goes to the obligatory standards imposed by the statute. Due to the above factors, the abstention doctrine is not appropriate. Harris County Commissioners Court v. Moore, 420 U.S. 77, 86, 95 S.Ct. 870, 876-877 (1975).

CONCLUSION

For these reasons, a writ of certiorari should be granted to review the judgment and opinion of the District Court of Appeal for the First District of Florida.

The issues presented to this Court are of great importance not only to medical practitioners in Florida, but to all licensed professionals and the people they serve. This Court has not heretofore addressed the notice requirements and evidence standards which are required to revoke such an important property interest.

Petitioner's license was suspended for one year ending January 15, 1986, at which time he began a three year probationary period. The unconstitutional suspension of professional licenses for brief periods of time is a repetitive state action which may evade review. Southern Pacific Terminal Co.

v. Interstate Commerce Commission, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed 310 (1911).

The sanctions imposed by the Florida Board of Medical Examiners prevent Petitioner from practicing medicine in a reasonable and constitutionally protected fashion. Furthermore, the stigma of the disciplinary actions has and will continue to have a detrimental effect on his ability to earn a living.

These sanctions have caused and continue to cause Petitioner's patients to lose confidence in his ability to practice medicine. This suspension, while relatively short in duration, has also made it impossible for Petitioner to obtain medical mal-

practice insurance at reasonable rates and to be granted hospital privileges.

Respectfully submitted,

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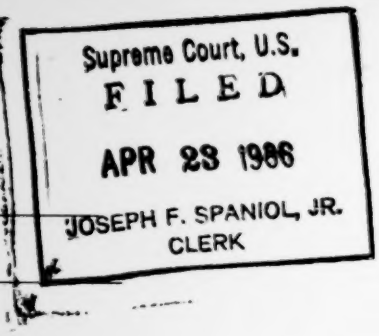

CASE NO. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ALI A. AZIMA, M.D., PETITIONER,

v.

FLORIDA DEPARTMENT OF
PROFESSIONAL REGULATION,
BOARD OF MEDICAL EXAMINERS,
RESPONDENT.

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOR THE FIRST DISTRICT OF FLORIDA

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APPENDIX -- SECTION I

I. Opinion of the District Court of Appeal, First District, State of Florida.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

ALI A. AZIMA, M.D.,

Appellant,

vs.

DEPARTMENT OF PROFESSIONAL REGULATION,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. BE-368

Opinion filed July 15, 1985.

Appeal from an order of the Department of Professional Regulation, Board of Medical Examiners.

Bernard H. Dempsey, Jr. and Richard Lee Barrett, Orlando, for appellant.

J. Riley Davis, Tallahassee, for appellee.

BARFIELD, J.

Dr. Azima appeals the order of the Department of Professional Regulation (Department) which suspended his license for failure "to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances." See Fla. Stat. section 458.331(1)(t)(1981). Appellant contends that the Department's order is not supported by competent and substantial evidence. We disagree and affirm.

Dr. Azima operated a clinic in the Fort Myers area which provided birth control services and performed pregnancy termination procedures. The hearing officer found that Dr. Azima provided substandard care to two of his patients and the Department accepted her

findings of fact and conclusions of law. Appellant asserts that the Department erred because the evidence against him was all in the form of expert testimony of physicians who were in direct competition with him.[1] It is his position that under the rationale of Robinson v. Florida Board of Dentistry, 447 So.2d 930 (Fla. 3d DCA 1984), the competing physicians' testimony did not provide a sufficient evidentiary basis to support the Department's order.

In Robinson, the district court reversed an order which imposed sanctions against a dentist for alleged substandard treatment of a patient. The expert testimony against Dr. Robinson consisted solely of the

---

[1]There were six physicians performing pregnancy terminations outside of the hospital setting in Fort Myers at the time of the hearing. Four of appellant's five competitors testified against him.

opinions of Dr. Beard, the dentist who succeeded Dr. Robinson in treating the patient. The court found that where the successor had an interest in seeing his recommended treatment recognized as "correct" and had a continuing financial interest in the patient, his testimony, without more, could not support a license suspension.

We find that the facts before us differ from those in Robinson in several significant respects. First, four different local physicians testified against the appellant. Thus, their testimony presented a much broader cross-section of the local medical community than was made available in Robinson.[2] Moreover, the "interests" of the testifying physicians here were different

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[2]We reject appellant's simplistic argument that because three of the four witnesses were partners, their similar views should only be regarded as a single opinion.

from those present in Robinson. Unlike Dr. Beard, these physicians did not recommend totally different courses of treatment but instead testified that Dr. Azima's care was substandard by his failure to perform or have performed certain tests to safeguard his patients' health.[3] Additionally, there was no suggestion that any of the physicians were continuing to treat these patients and, accordingly, there is no showing of continued financial interests in the patients on the part of the witnesses.

Based on the above, we hold Robinson inapplicable to the instant case. As the order of the Department of Professional Regu-

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[3]Specifically, appellant failed to use a blood test to determine pregnancy before inserting an IUD in a woman who exhibited symptoms of pregnancy; and failed to determine a woman's Rh factor and hemoglobin level at the time of a termination procedure and failed to take appropriate steps to recognize that he had not, in fact, terminated the pregnancy.

lation is supported by competent and substantial evidence, it is AFFIRMED.

BOOTH, Chief Judge, and WIGGINTON, J., CONCUR.

APPENDIX -- SECTION II

II. Final Order of the Board of Medical Examiners, State of Florida.

BEFORE THE BOARD OF MEDICAL EXAMINERS

DEPARTMENT OF PROFESSIONAL REGULATION,	DPR CASE NOS. 0034574, 0014227, 0014657, 0014312, 0018786
Petitioner,	
vs.	
ALI A. AZIMA, M.D.,	DOAH CASE NO. 83-1205, 83-2589,
Respondent. /	LICENSE NO. ME 20485

FINAL ORDER OF THE
BOARD OF MEDICAL EXAMINERS

This cause came before the Board of Medical Examiners (Board) pursuant to Section 120.57(1)(b)(9), Florida Statutes, on December 1, 1984, in Miami, Florida for the purpose of considering the hearing officer's Recommended Order (a copy of which is attached hereto) in the above-styled cause. Peti-

tioner, Department of Professional Regulation, was represented by William M. Furlow, Esquire; Respondent was present and represented by Bernard H. Dempsey, Jr., Esquire and Richard Lee Barrett.

Upon review of the recommended order, the argument of the parties, and after a review of the complete record in this case, the Board makes the following findings and conclusions.

FINDINGS OF FACT

1. The exceptions to the recommended Order filed by Respondent are rejected in that they would require the Board to reweigh the evidence presented. This the Board may not do. Wagner v. Department of Professional Regulation, 405 So.2d 471. In addition, the Board finds no reason to believe the hearing officer failed to consider any of the evidence presented.

2. The hearing officer's findings of fact are approved and adopted in toto and are incorporated by reference herein.

3. There is competent substantial evidence in the record to support the Board's findings of fact.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter pursuant to the provision of Section 120.57(2), Florida Statutes, and Chapter 458, Florida Statutes.

2. The hearing officer's conclusions of law are approved and adopted in toto and are incorporated by reference herein.

3. There is competent substantial evidence in the record to support the Board's conclusions of law.

DISPOSITION

Upon a review of the complete record in this case, the Board determines that the

penalty recommended by the hearing officer be altered. WHEREFORE,

IT IS HEREBY ORDERED AND ADJUDGED that:

1. Respondent's license to practice medicine in Florida shall be suspended for a period of one year, with the specific provision that in six months Respondent may request that the Board stay the second six months of the suspension.

2. Upon the termination or stay of the suspension, Respondent's license to practice medicine in Florida shall be placed on probation for a period of three years, subject to the term and condition that Respondent make semi-annual appearances before the Board.

3. During the periods of suspension and probation, Respondent shall earn fifty (50) hours of Category 1 continuing medical

education annually. This Order takes effect upon filing.

Pursuant to Section 120.59, Florida Statutes, the parties are hereby notified that they may appeal this final order by filing one copy of a notice of appeal with the clerk of the agency and by filing the filing fee and one copy of a notice of appeal with the District Court of Appeal within thirty days of the date this order is filed, as provided in Chapter 120, Florida Statutes, and the Florida Rules of Appellate Procedure.

DONE AND ORDERED this 9 day of January, 1985.

BOARD OF MEDICAL EXAMINERS

Richard J. Feinstein, M.D.
CHAIRMAN

APPENDIX -- SECTION III.

III. Text of Statutes,[1] Regulations and Constitutional Provisions Which the Case Involves

§390.001, Fla. Stat., Termination of pregnancies

* * *

(7) Fetal remains.--Fetal remains shall be disposed of in a sanitary and appropriate manner and in accordance with standard health practices, as provided by rule of the Department of Health and Rehabilitative Services. Failure to dispose of fetal remains in accordance with department rules is a misdemeanor of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

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[1]Text added to statutes subsequent to January
FOOTNOTE CONTINUED ON NEXT PAGE.

§458.331, Fla. Stat., Grounds for disciplinary action; action by the board

(1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:

(a) Attempting to obtain, obtaining, or renewing a license to practice medicine by bribery, by fraudulent misrepresentations, or through an error of the department or the board.

(b) Having a license to practice medicine revoked, suspended, or otherwise acted against, including the denial of licen-

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16, 1985, when the Board of Medical Examiners rendered its Final Order is underscored. Unless otherwise noted (see note 2), there were no deletions or other revisions to the statutes between January 16, 1985, and the filing date of this Petition for Writ of Certiorari.

sure, by the licensing authority of anothe state, territory, or country.

(c) Being convicted or found guilty regardless of adjudication, of a crime in an jurisdiction which directly relates to th practice of medicine or to the ability t practice medicine. Any plea of nolo conten dere shall be considered a conviction fo purposes of this chapter.

(d) False, deceptive, or misleadin advertising.

(e) Advertising, practicing, o attempting to practice under a name othe than one's own.

(f) Failing to report to the depart ment any person whom the licensee knows is i violation of this chapter or of the rules o the department or the board. However, if th licensee verifies that the person is activel

participating in a board-approved program for the treatment of a physical or mental condition, he is required only to report such person to an impaired professional consultant.

(g) Aiding, assisting, procuring, or advising any unlicensed person to practice medicine contrary to this chapter or to a rule of the department or the board.

(h) Failing to perform any statutory or legal obligation placed upon a licensed physician.

(i) Making or filing a report which the licensee knows to be false, intentionally or negligently failing to file a report or record required by state or federal law, willfully impeding or obstructing such filing or inducing another person to do so. Such reports or records shall include only those

which are signed in the capacity as a licensed physician.

(j) Paying or receiving any commission, bonus, kickback, or rebate, or engaging in any split-fee arrangement in any form whatsoever with a physician, organization, agency, or person, either directly or indirectly, for patients referred to providers of health care goods and services, including, but not limited to, hospitals, nursing homes, clinical laboratories, ambulatory surgical centers, or pharmacies. The provisions of this paragraph shall not be construed to prevent a physician from receiving a fee for professional consultation services.

(k) Exercising influence within a patient-physician relationship for purposes of engaging a patient in sexual activity. A patient shall be presumed to be incapable of

giving free, full, and informed consent to sexual activity with his or her physician.

(l) Making deceptive, untrue, or fraudulent representations in the practice of medicine or employing a trick or scheme in the practice of medicine when such scheme or trick fails to conform to the generally prevailing standards of treatment in the medical community.

(m) Soliciting patients, either personally or through an agent, through the use of fraud, intimidation, undue influence, or a form of overreaching or vexatious conduct. A solicitation is any communication which directly or implicitly requests an immediate oral response from the recipient.

(n) Failing to keep written medical records justifying the course of treatment of the patient, including, but not limited to,

patient histories, examination results, an
test results.

(o) Exercising influence on th
patient or client in such a manner as t
exploit the patient or client for financia
gain of the licensee or of a third part
which shall include, but not be limited to
the promoting or selling of services, goods
appliances, or drugs and the promoting o
advertising on any prescription form of
community pharmacy unless the form shall als
state "This prescription may be filled at an
pharmacy of your choice."

(p) Performing professional service
which have not been duly authorized by th
patient or client, or his legal representa
tive, except as provided in s. 743.064
s. 768.13, or s. 768.46.

(q) Prescribing, dispensing, administering, mixing, or otherwise preparing a legend drug, including any controlled substance, other than in the course of the physician's professional practice. For the purposes of this paragraph, it shall be legally presumed that prescribing, dispensing, administering, mixing, or otherwise preparing legend drugs, including all controlled substances, inappropriately or in excessive or inappropriate quantities is not in the best interest of the patient and is not in the course of the physician's professional practice, without regard to his intent.

(r) Prescribing, dispensing, or administering any medicinal drug appearing on any schedule set forth in chapter 893 by the physician to himself, except one prescribed, dispensed, or administered to the physician

by another practitioner authorized to prescribe, dispense, or administer medicinal drugs.

(s) Being unable to practice medicine with reasonable skill and safety to patients by reason of illness or use of alcohol, drugs, narcotics, chemicals, or any other type of material or as a result of any mental or physical condition. In enforcing this paragraph, the department shall have, upon probable cause, authority to compel a physician to submit to a mental or physical examination by physicians designated by the department. Failure of a physician to submit to such examination when so directed shall constitute an admission of the allegations against him, unless the failure was due to circumstances beyond his control, consequent upon which a default and final order may be

entered without the taking of testimony or presentation of evidence. A physician affected under this paragraph shall at reasonable intervals be afforded an opportunity to demonstrate that he can resume the competent practice of medicine with reasonable skill and safety to patients. In any proceeding under this paragraph, neither the record of proceedings nor the order entered by the board shall be used against a physician in any other proceeding.

(t) Gross or repeated malpractice or the failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances. The board shall give great weight to the provisions of s. 768.45 when enforcing this paragraph. As

used in this paragraph, "repeated malpractice" includes, but is not limited to, three or more claims for medical malpractice within the previous 5-year period resulting in indemnities being paid in excess of $10,000 each to the claimant in a judgment or settlement and which incidents involved negligent conduct by the physician. As used in this paragraph, "gross malpractice" or "the failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances," shall not be construed so as to require more than one instance, event, or act.

(u) Performing any procedure or prescribing any therapy which, by the prevailing standards of medical practice in the com-

munity, would constitute experimentation on a human subject, without first obtaining full, informed, and written consent.

(v) Practicing or offering to practice beyond the scope permitted by law or accepting and performing professional responsibilities which the licensee knows or has reason to know that he is not competent to perform.

(w) Delegating professional responsibilities to a person when the licensee delegating such responsibilities knows or has reason to know that such person is not qualified by training, experience, or licensure to perform them.

(x) Violating any provision of this chapter, a rule of the board or department, or a lawful order of the board or department previously entered in a disciplinary hearing

or failing to comply with a lawfully issued subpoena of the department.

(y) Conspiring with another licensee or with any other person to commit an act, or committing an act, which would tend to coerce, intimidate, or preclude another licensee from lawfully advertising his services.

(z) Procuring, or aiding or abetting in the procuring of, an unlawful termination of pregnancy.

(aa) Presigning blank prescription forms.

(bb) Prescribing any medicinal drug appearing on schedule II in chapter 893 by the physician for office use.

(cc) Prescribing, ordering, dispensing, administering, supplying, selling, or giving any drug which is an amphetamine or

sympathomimetic amine drug or a compound designated as a Schedule II controlled substance, pursuant to chapter 893, to or for any person except for:

1. The treatment of narcolepsy; hyperkinesis; behavioral syndrome in children characterized by the developmentally inappropriate symptoms of moderate to severe distractability, short attention span, hyperactivity, emotional lability, and impulsivity; or drug-induced brain dysfunction; or

2. The differential diagnostic psychiatric evaluation of depression or the treatment of depression shown to be refractory to other therapeutic modalities; or

3. The clinical investigation of the effects of such drugs or compounds when an investigative protocol therefor is submit-

ted to, reviewed, and approved by the board before such investigation is begun.

(dd) Failing to supervise adequately the activities of those physician's assistants, emergency medical technicians, or advanced registered nurse practitioners acting under the supervision of the physician.

(ee) Prescribing, ordering, dispensing, administering, supplying, selling, or giving growth hormones, testosterone or its analogs, human chorionic gonadotropin (HCG), or other hormones for the purpose of muscle building or to enhance athletic performance. For the purposes of this subsection, the term "muscle building" does not include the treatment of injured muscle. A prescription written for the drug products listed above may be dispensed by the pharmacist with the presump-

tion that the prescription is for legitimate medical use.

(2) When the board finds any person guilty of any of the grounds set forth in subsection (1), it may enter an order imposing one or more of the following penalties:

(a) Refusal to certify to the department an application for licensure.

(b) Revocation or suspension of a license.

(c) Restriction of practice.

(d) Imposition of an administrative fine not to exceed $1,000 for each count or separate offense.

(e) Issuance of a reprimand.

(f) Placement of the physician on probation for a period of time and subject to such conditions as the board may specify, including, but not limited to, requiring the

physician to submit to treatment, to attend continuing education courses, to submit to reexamination, or to work under the supervision of another physician.

(3) the board shall not reinstate the license of a physician, or cause a license to be issued to a person it has deemed unqualified, until such time as it is satisfied that he has complied with all the terms and conditions set forth in the final order and that such person is capable of safely engaging in the practice of medicine.

(4) The board shall by rule establish guidelines for the disposition of disciplinary cases involving specific types of violations. Such guidelines may include minimum and maximum fines, periods of supervision or probation, or conditions of probation or reissuance of a license.

(5) Upon the department's receipt from the Department of Insurance of the name of a physician having three or more claims with indemnities exceeding $10,000 each within the previous 5-year period, including reports for the 3-year period preceding the effective date of this act, the department shall investigate the occurrences upon which the claims were based and determine if action by the department against the physician is warranted.

(6) Upon the department's receipt from the Department of Health and Rehabilitative Services pursuant to s. 395.041 of the name of a physician whose conduct may constitute grounds for disciplinary action by the department, the department shall investigate the occurrences upon which the report was based and determine if action by the

department against the physician is warranted.

§768.45, Fla. Stat., Medical negligence; standards of recovery. [2]

(1) In any action for recovery of

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[2]Effective October 1, 1985, §768.45, Fla. Stat., was revised as follows: subsection (1) was rewritten; the last sentence of subsection (2)(b) was added; subsection (2)(c)(2) was rewritten to substitute reference to "prevailing professional standard" for "accepted standard" of care in subsections (3)(a) and (4) and subsection (5) was added. Prior to the 1985 amendment, subsections (1) and (2)(c) provided:

> (1) In any action for recovery of damages based on the death or personal injury of any person in which it is alleged that such death or injury resulted from the negligence of a health care provider as defined in s. 768.50 (2)(b), the claimant shall have the burden of proving by the greater weight of evidence that the alleged actions of the health care provider represented a breach of the accepted standard of care for that health care provider. The accepted standard of care for a given health care provider shall be that level of

FOOTNOTE CONTINUED ON NEXT PAGE.

damages based on the death or personal injury of any person in which it is alleged that such death or injury resulted from the negligence of a health care provider as defined in s. 768.50(2)(b), the claimant shall have the burden of proving by the greater weight of

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care, skill, and treatment which is recognized by a reasonably prudent similar health care provider as being acceptable under similar conditions and circumstances.

(2)(c) The purpose of this subsection is to establish a relative standard of care for various categories and classifications of health care providers. Any health care provider may testify as an expert in any action if he:

1. Is a "similar health care provider" pursuant to paragraph (a) or (b); or,

2. Is not a similar health care provider pursuant to paragraph (a) or (b) but, to the satisfaction of the court, possesses sufficient training, experience, and knowledge to provide such expert testimony as to the acceptable standard of care in a given cause.

evidence that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider. The prevailing professional standard of care for a given health care provider shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.

(2)(a) If the health care provider whose negligence is claimed to have created the cause of action is not certified by the appropriate American board as being a specialist, is not trained and experienced in a medical specialty, or does not hold himself out as a specialist, a "similar health care provider" is one who:

1. Is licensed by the appropriate regulatory agency of this state;

2. Is trained and experienced in the same discipline or school of practice; and

3. Practices in the same or similar medical community.

(b) If the health care provider whose negligence is claimed to have created the cause of action is certified by the appropriate American board as a specialist, is trained and experienced in a medical specialty, or holds himself out as a specialist, a "similar health care provider" is one who:

1. Is trained and experienced in the same specialty; and

2. Is certified by the appropriate American board in the same specialty. However, if any health care provider described

in this paragraph is providing treatment or diagnosis for a condition which is not within his specialty, a specialist trained in the treatment or diagnosis for that condition shall be considered a "similar health care provider."

(c) The purpose of this subsection is to establish a relative standard of care for various categories and classifications of health care providers. Any health care provider may testify as an expert in any action if he:

1. Is a similar health care provider pursuant to paragraph (a) or paragraph (b); or

2. Is not a similar health care provider pursuant to paragraph (a) or paragraph (b) but, to the satisfaction of the court, possesses sufficient training, experi-

ence, and knowledge as a result of practice or teaching in the specialty of the defendant or practice or teaching in a related field of medicine, so as to be able to provide such expert testimony as to the prevailing professional standard of care in a given field of medicine. Such training, experience, or knowledge must be as a result of the active involvement in the practice or teaching of medicine within the 5-year period before the incident giving rise to the claim.

(3)(a) If the injury is claimed to have resulted from the negligent affirmative medical intervention of the health care provider, the claimant must, in order to prove a breach of the prevailing professional standard of care, show that the injury was not within the necessary or reasonably foreseeable results of the surgical, medicinal, or

diagnostic procedure constituting the medical intervention, if the intervention from which the injury is alleged to have resulted was carried out in accordance with the prevailing professional standard of care by a reasonably prudent similar health care provider.

(b) The provisions of this subsection shall apply only when the medical intervention was undertaken with the informed consent of the patient in compliance with the provisions of s. 768.46.

(4) The existence of a medical injury shall not create any inference or presumption of negligence against a health care provider, and the claimant must maintain the burden of proving that an injury was proximately caused by a breach of the prevailing professional standard of care by the health care provider. However, the discovery of the

presence of a foreign body, such as a sponge, clamp, forceps, surgical needle, or other paraphernalia commonly used in surgical, examination, or diagnostic procedures, shall be prima facie evidence on the part of the health care provider.

(5) The Legislature is cognizant of the changing trends and techniques for the delivery of health care in this state and the discretion that is inherent in the diagnosis, care, and treatment of patients by different health care providers. The failure of a health care provider to order, perform, or administer supplemental diagnostic tests shall not be actionable if the health care provider acted in good faith and with due regard for the prevailing professional standard of care.

FLORIDA ADMINISTRATIVE PROCEDURE ACT, CHAPTER 120, FLA. STAT.

§120.57, Fla. Stat., Decisions which affect substantial interests

The provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency, unless such proceedings are exempt pursuant to subsection (5). Unless waived by all parties, subsection (1) applies whenever the proceeding involves a disputed issue of material fact. Unless otherwise agreed, subsection (2) applies in all other cases.

(1) **Formal proceedings.--**

(a) A hearing officer assigned by the division shall conduct all hearings under this subsection, except for:

1. Hearings before agency heads or a member thereof other than an agency head or

a member of an agency head within the Department of Professional Regulation;

2. Hearings before the Unemployment Appeals Commission in unemployment compensation appeals, unemployment compensation appeals referees, and special deputies pursuant to s. 443.141;

3. Hearings regarding drivers' licensing pursuant to chapter 322;

4. Hearings conducted within the Department of Health and Rehabilitative Services in the execution of those social and economic programs administered by the former Division of Family Services of said department prior to the reorganization effected by chapter 75-48, Laws of Florida;

5. Hearings in which the division is a party, in which case an attorney

assigned by the Administration Commission shall be the hearing officer;

6. Hearings which involve student disciplinary suspensions or expulsions and which are conducted by educational units;

7. Hearings of the Public Employees Relations Commission in which a determination is made of the appropriateness of the bargaining unit, as provided in s. 447.307; and

8. Hearings held by the Department of Agriculture and Consumer Services pursuant to chapter 601.

(b) In any case to which this subsection is applicable, the following procedures apply:

1. A request for a hearing shall be granted or denied within 15 days of receipt.

2. All parties shall be afforded an opportunity for a hearing after reasonable

notice of not less than 14 days; however, the 14-day notice requirement may be waived with the consent of all parties. In a preliminary hearing for the revocation of parole, no less than 7 days' notice shall be given. In a hearing involving a student disciplinary suspension or expulsion conducted by an educational unit, the 14-day notice requirement may be waived by the agency head or the hearing officer without the consent of the parties. The notice shall include:

a. A statement of the time, place, and nature of the hearing.

b. A statement of the legal authority and jurisdiction under which the hearing is to be held.

c. A reference to the particular sections of the statutes and rules involved.

d. Except for any hearing before an unemployment compensation appeals referee, a short and plain statement of the matters asserted by the agency and by all parties of record at the time notice is given. If the agency or any party is unable to state the matters in sufficient detail at the time initial notice is given, the notice may be limited to a statement of the issues involved, and thereafter, upon timely written application, a more definite and detailed statement shall be furnished not less than 3 days prior to the date set for the hearing.

3. Except for any proceeding conducted as prescribed in s. 120.54(4) or s. 120.56, a petition or request for a hearing under this section shall be filed with the agency. If the agency elects to request a hearing officer from the division, it shall

so notify the division within 10 days of receipt of the petition or request. When the Florida Land and Water Adjudicatory Commission receives a notice of appeal pursuant to s. 380.07, the commission shall notify the division within 60 days of receipt of the notice of appeal if the commission elects to request the assignment of a hearing officer. On the request of any agency, the division shall assign a hearing officer with due regard to the expertise required for the particular matter. The referring agency shall take no further action with respect to the formal proceeding, except as a party litigant, as long as the division has jurisdiction over the formal proceeding. Any party may request the disqualification of the hearing officer by filing an affidavit with the division

prior to the taking of evidence at a hearing, stating the grounds with particularity.

4. All parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of facts and orders, to file exceptions to any order or hearing officer's recommended order, and to be represented by counsel. When appropriate, the general public may be given an opportunity to present oral or written communications. If the agency proposes to consider such material, then all parties shall be given an opportunity to cross-examine or challenge or rebut it.

5. The record in a case governed by this subsection shall consist only of:

a. All notices, pleadings, motions, and intermediate rulings;

b. Evidence received or considered;

c. A statement of matters officially recognized;

d. Questions and proffers of proof and objections and rulings thereon;

e. Proposed findings and exceptions;

f. Any decision, opinion, proposed or recommended order, or report by the officer presiding at the hearing;

g. All staff memoranda or data submitted to the hearing officer during the hearing or prior to its disposition, after notice of the submission to all parties, except communications by advisory staff as permitted under s. 120.66(1), if such communications are public records;

h. All matters placed on the record after an ex parte communication pursuant to s. 120.66(2); and

i. The official transcript.

6. The agency shall accurately and completely preserve all testimony in the proceeding, and, on the request of any party, it shall make a full or partial transcript available at no more than actual cost. In any proceeding before a hearing officer initiated by a consumptive use permit applicant pursuant to subparagraph 13, the applicant shall bear the cost of accurately and completely preserving all testimony and providing full or partial transcripts to the water management district. At the request of any party, full or partial transcripts shall be provided at no more than cost.

7. Findings of fact shall be based exclusively on the evidence or record and on matters officially recognized.

8. Except as provided in subparagraph 12, the hearing officer shall complete and submit to the agency and all parties a recommended order consisting of his findings of fact, conclusions of law, interpretation of administrative rules, and recommended penalty, if applicable, and any other information required by law or agency rule to be contained in the final order. The agency shall allow each party at least 10 days in which to submit written exceptions to the recommended order.

9. The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law and interpreta-

tion of administrative rules in the recommended order, buy may not reject or modify the findings of fact unless the agency first determines from a review of the complete record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may acccept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action. When there is an appeal, the court in its discretion may award reasonable attorney's fees and costs to the prevailing party if the court finds that

the appeal was frivolous, meritless, or an abuse of the appellate process or that the agency action which precipitated the appeal was a gross abuse of the agency's discretion.

10. If the hearing officer assigned to a hearing becomes unavailable, the division shall assign another hearing officer who shall use any existing record and receive any additional evidence or argument, if any, which the new hearing officer finds necessary.

11. A hearing officer who is a member of an agency head may participate in the formulation of the final order of the agency, provided he has completed all his duties as hearing officer.

12. In any application for a license or merger pursuant to title XXXVIII which is referred by the agency to the division for

hearing pursuant to this section, the hearing officer shall complete and submit to the agency and to all parties a written report consisting of findings of fact and rulings on evidentiary matters. The agency shall allow each party at least 10 days in which to submit written exceptions to the report.

13. In any application for a consumptive use permit pursuant to part II of chapter 373, the water managemert district on its own motion may, or, at the request of the applicant for the permit, shall, refer the matter to the division for the appointment of a hearing officer to conduct a hearing under this section.

§120.68 Judicial review.

(1) A party who is adversely affected by final agency action is entitled to judicial review. For purposes of this section, a district school board, whose decision is reviewed under the provisions of s. 231.36 and whose final action is modified by a superior administrative decision, shall be a party entitled to judicial review of the final action. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(2) Except in matters for which judicial review by the Supreme Court is provided by law, all proceedings for review shall be instituted by filing a petition in the district court of appeal in the appellate district where the agency maintains its headquar-

ters or where a party resides. Review proceedings shall be conducted in accordance with the Florida Appellate Rules.

(3) The filing of the petition does not itself stay enforcement of the agency decision, but if the agency decision has the effect of suspending or revoking a license, supersedeas shall be granted as a matter of right upon such conditions as are reasonable, unless the court, upon petition of the agency, determines that a supersedeas would constitute a probable danger to the health, safety, or welfare of the state. The agency may also grant a stay upon appropriate terms, but, whether or not the action has the effect of suspending or revoking a license, a petition to the agency for a stay shall not be a prerequisite to a petition to the court for supersedeas. In any event, the order shall

specify the conditions, if any, upon which the stay or supersedeas is granted.

(4) Judicial review of any agency shall be confined to the record transmitted and any additions made thereto in accordance with subsection (6).

(5) The record for judicial review shall consist of the following:

(a) The agency's written document expressing the order, the statement of reasons therefore if issued, and the record under s. 120.57, if review of proceedings under that section is sought.

(b) The agency's written document expressing the action, the statement of reasons therefor, if issued, and the materials considered by the agency under s. 120.54, if review is sought of proceedings under that section.

(c) The agency's written document expressing the action, and other written documents identified by the agency as having been considered by it before its action and used as a basis for its action, if review is sought of proceedings under s. 120.56 or s. 120.565 or if there has been no proceeding under s. 120.54 or s. 120.57.

(6) When there has been no hearing prior to agency action and the reviewing court finds that the validity of the action depends upon disputed facts, the court shall order the agency to conduct a prompt, fact-finding proceeding under this act after having a reasonable opportunity to reconsider its determination on the record of the proceedings.

(7) The reviewing court shall deal separately with disputed issues of agency

procedure, interpretations of law, determinations of fact, or policy within the agency's exercise of delegated discretion.

(8) The court shall remand the case for further agency action if it finds that either the fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure. Failure of any agency to comply with s. 120.53 shall be presumed to be a material error in procedure.

(9) If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, it shall:

(a) Set aside or modify the agency action, or

(b) Remand the case to the agency for further action under a correct interpretation of the provision of law.

(10) If the agency's action depends on any fact found by the agency in a proceeding meeting the requirements of s. 120.57 of the act, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by competent substantial evidence in the record.

(11) If the agency's action depends on facts determined pursuant to subsection (6), the court shall set aside, modify, or order agency action if the facts compel a

particular action as a matter of law, or it may remand the case to the agency for further examination and action within the agency's responsibility.

(12) The court shall remand the case to the agency if it finds the agency's exercise of discretion to be:

(a) Outside the range of discretion delegated to the agency by law;

(b) Inconsistent with an agency rule, an officially stated agency policy, or a prior agency practice, if deviation therefrom is not explained by the agency; or

(c) Otherwise in violation of a constitutional or statutory provision;

but the court shall not substitute its judgment for that of the agency on an issue of discretion.

(13)(a) The reviewing court's decision may be mandatory, prohibitory, or declaratory in form, and it shall provide whatever relief is appropriate irrespective of the original form of the petition. The court may:

1. Order agency action required by law, order agency exercise of discretion when required by law, set aside agency action, remand the case for further agency proceedings, or decide the rights, privileges, obligations, requirements, or procedures at issue between the parties, and

2. Order such ancillary relief as the court finds necessary to redress the effects of official action wrongfully taken or withheld.

(b) If the court sets aside agency action or remands the case to the agency for

further proceedings, it may make such interlocutory order as the court finds necessary to preserve the interests of any party and the public further proceedings or agency action.

(14) Unless the court finds a ground for setting aside, modifying, remanding, or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agency's action.

Fla. Admin. Code, Rule 10D-72.16

§10D-72.16 Disposal of Fetal Remains.

All fetal remains shall be disposed of in a sanitary, nuisance free manner. Incineration or burial of such remains, as well as other nuisance free methods, are acceptable so long as the licensing agency is assured that the disposal method utilized is nuisance free.

U.S. CONST., AMEND. XIV, §1

CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX -- SECTION IV

IV. Portion of Record Demonstrating That Both Federal Questions Were Timely and Properly Raised.

The following excerpts are from Petitioner's briefs to the District Court of Appeal for the First District of Florida. Regarding the first question presented:

What is perhaps the most disturbing feature about prosecutions under §458.331(1)(t), Fla. Stat., is that doctors [sic] may be denied the right to practice medicine based on unwritten and uncodified standards determined by a loosely assembled group of his peers. As such, medical licensees are put on no notice whatsoever regarding what conduct is prohibited. This leaves the DPR free to create and enforce standards which are developed at will, promulgated ad hoc, and enforced ex post facto. If a physician cannot feel safe by following to the letter the written promulgated standards of his profession

without fear of being ambushed by zealous DPR prosecutors wielding a stable of "interested physicians," then no doctor anywhere can practice his profession without performing procedures which are unnecessary yet are performed "primarily to protect us and the clinic." [Petitioner's Initial Brief, pp. 39-40].

* * *

The standard by which Appellant is to be judged, "that level of care, skill and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances," is vague, ambiguous and subject to a wide range of interpretation. The average jurist has little idea what medical procedures are appropriate in a given circumstance and even less understanding about how the procedures should be performed. [Petitioner's Reply Brief, p. 11].

Regarding the second question presented:

What is particularly interesting about the Robinson case is that the only evidence that Dr. Robinson's treatment was improper came from a doctor who had, as the court put it, "a professional interest in having his course of treatment recognized as being the 'correct' or 'justifiable' one." What makes the case so revealing in the instant proceeding is that all of the evidence that Dr. AZIMA failed to meet medical standards was offered by Drs. Yankopolus, Waterman, Cowdin and Sibley who also had an interest in having their course of treatment recognized as being the "correct" or "justifiable" one. The court in Robinson said:

> It should be absolutely self-evident that suspending a professional license solely on the basis of the testimony of one interested witness does not even begin to approach the level of "competent substantial evidence" as

required by section 120.57. Dr. Beard's opinion as to why extraction was the only available option in this case was certainly relevant testimony. But the hearing officer and the petitioner's attorney should have understood that Dr. Beard would have a professional interest in having his course of treatment recognized as being the "correct" or "justifiable" one. In addition, Dr. Beard had a continuing financial interest in the case in that the complainant was, presumably, still his patient. Without impugning Dr. Beard's motives, we find his testimony suspect. One professional's opposing opinion, without more, on a particular treatment is neither substantial evidence of incompetence nor a measure of "generally prevailing peer performance." Cf. section 466.028(1)(y), Florida Statutes.

The Department of Professional Regulation, as well as the specific professional boards coming under its purview, must remember that the suspension of a license which is essential in the pursuit of livelihood involves state action. Such licenses may not be revoked or suspended without procedural due process. Barry v. Barchi, 433

U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979).

> Id. at 932. (Footnotes omitted. Emphasis added.)

See also, Davis v. Department of Professional Regulation, 457 So.2d 1074, 1077 (Fla. 1st DCA 1984); and Johnston v. Department of Professional Regulation, 456 So.2d 939, 944 (Fla. 1st DCA 1984), which cite Robinson with approval and hold accordingly.

No more was presented in Petitioner's hearing in the way of competent substantial evidence than was presented in the Robinson case. [Petitioner's Initial Brief, pp. 24-25].

* * *

Because such proceedings are penal in nature, the courts have universally held that the proof must be substantially greater than that which is required to support conventional agency action. Bowling v. Department of Insurance, 394 So.2d 165, 171 (Fla. 1st DCA

1981). In other words, the proof must be commensurate with the potential penalty. Henderson Signs, Inc. v. Department of Transportation, 397 So.2d 769 (Fla. 1st DCA 1981); Department of Professional Regulation v. Whitney, 6 FALR 5033, 5045, DOAH Case No. 82-2557 (Final Order of Board of Medical Examiners, June 29, 1984).

In Bowling, this Court explained:

> In a proceeding under a penal statute for suspension or revocation of a valuable business or professional license, the term "competent substantial evidence" takes on vigorous implications that are not so clearly present on other occasions for agency action under Chapter 120.
>
> * * *
>
> Evidence which is "substantial" for one purpose may be less so on another, graver occasion. One takes a stranger's name at his word upon a chance meeting, but wants

> better proof to cash his check.
>
> Id. at 171. (Footnote omitted.)

This Court again emphasized its commitment to the principles expressed in Bowling in its opinion in Davis v. Department of Professional Regulation, 457 So.2d 1074, 1076 (Fla. 1st DCA 1984):

> In Bowling the court echoes the concern expressed by the Florida Supreme Court in State v. Pattishall, supra, with regard to the higher seriousness accorded to the requirement of substantiality when the matter at stake is a license that allows one to earn a livelihood, saying "when the proceeding may result in the loss of a valuable business or professional license, the critical matters in issue must be shown by evidence which is indubitably as 'substantial' as the consequences." Bowling, supra, at 172. In Bowling, the court rejected the Department's evidentiary findings on the ground that they lacked a substantial basis for establishing Bowling's guilt on the eight counts with which

he was charged. The court vacated the order revoking Bowling's license.

[Petitioner's Initial Brief, pp. 20-21].

APPENDIX -- SECTION V.

V. Summary of the Case.

Preface

The following summary of testimony and facts is material to this Court's consideration of the questions presented. This summary of the record demonstrates that Petitioner had no prior notice of the medical standards by which he was found guilty of committing medical malpractice. Nor did the Department of Professional Regulation (hereinafter "DPR") prove by a preponderance of competent substantial evidence:

a. that Dr. Azima was legally obligated to determine the Rh factor of Ms. Kuchar's blood;

b. that Dr. Azima did not determine the Rh factor of Ms. Kuchar's blood; and

c. that Dr. Azima was required by law to send the abortion tissue for a pathological examination when Petitioner, in full accordance with the American College of OB/GYN standards, aware, clearly determined through a detailed visual examination that fetal remains were present and the abortion was successful.

It is also noted that each of the expert witnesses who testified against Dr. AZIMA treated one or more of the patients named in the DPR complaint.[1] Three of the four doctors who testified against Petitioner, Drs.

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[1]Dr. Cowdin treated both Christine Sellers and Holli Schmidt. Drs. Yankopolus and Waterman treated Holli Schmidt, and Dr. Sibley treated Coleen Lundy, who was also a complaining witness.

Yankopolus, Cowdin and Waterman, practice together and that practice is hereinafter referred to as the Yankopolus group.

1. The Petitioner

Dr. ALI AZIMA, the Petitioner, graduated from the Medical College at Tehran University, where he received his M.D. degree in 1961. (R. 357-358). During three years of residency in forensic medicine, he developed a knowledge and expertise in clinical pathology. (R. 358-359). After coming to the United States, Dr. AZIMA completed four more years of internship and residency in gynecology and obstetrics, including a fellowship in internal medicine. He is a specialist in Obstetrics and Gynecology (hereinafter referred to as "OB/GYN") (R. 359) and has established three subspecialties in oncology, endocrinology, and fetal internal medicine. (R. 360).

In 1974 Dr. AZIMA entered private practice in Baltimore, Maryland. (R. 360-361). In 1977, along with his wife, he established a women's health clinic in Fort Myers, Florida. (R. 369). It was at this women's health clinic that all of the complaining patients in the instant proceedings were treated. The clinic was licensed and met all standards and regulations for licensure during 1981 and 1982, the relevant time periods of this case. (R-368, 369).

Dr. AZIMA is a board-certified obstetrician-gynecologist (R. 363). During all periods relevant to this case, he was a member of the Charlotte County Medical Society, the Florida Medical Association, the American Board of OB/GYN, and was also a Fellow of the American College of Obstetricians and Gynecologists. (R. 364).

Prior to this case, Dr. AZIMA had delivered approximately 5,000 or 6,000 babies, and had in the course of his practice performed approximately 3,500 terminations of pregnancy. At the hearing he estimated that he has implanted as many as 1,000 intrauterine devices. (R. 364-365). Until the instant proceedings, he had never before been the subject of any malpractice complaints. (R. 365).

2. The Petitioner's Medical Procedures

In 1977 Dr. AZIMA established procedures to treat patients for both prenatal and abortion services at his Ft. Myers clinic. These procedures were based on his residency training and textbooks and met with all of the standards of the American College of Obstetricians and Gynecologists. (R. 369-370). As a member of the American College of Obstetricians and Gynecologists, he received all

of their literature. These publications were the only published standards of his profession and from 1977 to the present, there were no other published standards of his profession which he could follow. These facts were not contested or otherwise refuted in the record.

The procedures in place during 1981 and 1982 in the Fort Myers clinic were as follows:

Upon entering the clinic, it was standard procedure for a patient to receive three documents -- a consent form, an information sheet, and a post-abortion instruction form. (R. 371). Every patient had to sign the consent form (R. 372) and the patient registration record information sheets or else Dr. AZIMA would not proceed with treatment. (R. 373). After a patient paid, the nurse brought the chart to Dr. AZIMA and thereafter brought

the patient to his consultation room. (R. 374). Dr. AZIMA would then review the record and question the patient. (R. 375).

Dr. AZIMA questioned the patients to confirm their written information and determine whether they had overlooked anything, such as medications or past medical history. (R. 374-377). He would not proceed with any pregnancy termination procedure until a pregnancy test had been completed and the patient came to a final conclusion that she wanted the abortion. (R. 377). To assure pregnancy, Dr. AZIMA always administered a pregnancy test, generally the UCG Slide test, which is considered in the medical community to have a high degree of reliability. (R. 379-380).

Dr. AZIMA testified that these procedures were scrupulously followed for patients Sellers/Kuchar, Schmidt and Baker, and that he obtained from each of them information

concerning each patient's age, marital status, number of prior pregnancies, menstrual history and date of last menstrual period. (R. 380-382). For every prenatal and abortion patient, Dr. AZIMA testified that he "always" determines the age of the pregnancy, the blood type and Rh factor. (R. 381-382). He does not necessarily write down all information, but he always documents abnormal findings. (R. 383).

After using an anatomy chart to instruct the patient and asking the patient whether she has any questions (R-384), the patient leaves the consultation room, voids her bladder in the clinic lavatory and is led by a nurse to the examination room where the patient is prepared for an examination. (R. 385, 389). The detailed physical examination is described at R. 389 and R. 390.

In order to determine the actual age of the pregnancy (R. 392-393), the OB/GYN exam includes a pelvic examination. These procedures clearly comport with required OB/GYN standards. (R. 381, 391).

After the manual examination, he informs the patient that he is going to insert the speculum. He inspects the cervix for abnormalities, cleanses the vagina with an antiseptic solution, and then gives a paracervical block, which is an injection of one per cent Xylocaine, used to dilate and sound the uterine cavity. (R. 392-397).

Dilation of the cervix is accomplished with a cannula which is inserted into the vagina. The cannula corresponds in size to the age of the pregnancy. For example, a ten millimeter cannula is used for a ten-week pregnancy. (R. 397). The cervix is dilated one millimeter more than the size of the can-

nula to avoid discomfort to the patient. (R. 399).

Once the abortion is performed (R. 409), the uterus is massaged to help it contract and to reduce bleeding. (R. 410). At that point Dr. AZIMA, finished with the operation, watches the patient, talks with her and observes her condition. He also checks the patient's blood pressure at that time. (R. 410-411).

Dr. AZIMA then performs a detailed examination of the uterine product in order to identify the products of conception, as specifically detailed in the American College of OB/GYN standards. (R. 411).

If Dr. AZIMA is certain that fetal parts have been removed, he disposes of the uterine product. This fully comports with all Florida state regulations and statutes regarding the disposal of such tissue. If

there are any doubts, he sends the specimen to the pathologist for examination. (R. 412). There is no requirement by any standard to send every specimen to pathology. (R. 413).

Finally, the patient's blood pressure is taken for ccmparison and if it has not already been determined, the patient's blood is typed to determine her Rh factor. (R. 414, 415). If the patient is Rh negative, she is counseled that she may need RhoGam. Dr. AZIMA counself Rh negative patients and only offers the RhoGam, which they may refuse. (R. 417).

The nurse then asks the patient to sit up and see how she feels. The patient is told to lie down if there is any feeling of weakness or dizziness. She is told to lie down again if any dizziness occurs, otherwise she dresses and proceeds to the recovery room. (R. 417-418).

Dr. AZIMA then talks to the patient about how she feels, provides medication, and discusses contraceptive measures. (R. 418). He instructs the patient to read the pink instructional sheet again and to return in one week. (R. 419). Because abortion is a surgical procedure, a one-week return visit was a critical part of Dr. AZIMA's standard procedures. It is necessary in order to check for complications. (R. 419-420).

During the hearing, Dr. AZIMA's testimony as to these medical procedures and to their accordance with accepted professional standards was detailed and was in no way contravened by any evidence or testimony.

3. Case History and Testimony Relating to Holli Schmidt

(Count II of the March 15, 1983, Complaint)

A. Case History of Holli Schmidt

Dr. AZIMA was specifically found guil-

ty of violating §458.331(1)(t), Fla. Stat., for having implanted an IUD into Holli Schmidt without taking adequate precautions to ensure that she was not pregnant at the time of insertion.

Dr. AZIMA first saw Holli Schmidt on December 1, 1977, three years prior to the visit which led to these charges. She sought and received an abortion. (R. 436, 438, 479). On her follow-up appointment, he inserted an IUD (R. 438).

Ms. Schmidt again saw Dr. AZIMA on June 11, 1979, because she was nine days late with her period and exhibited all the signs of pregnancy. (R. 481). A pregnancy test, however, revealed that she was not pregnant and, therefore, no treatment was administered.

Her third visit came on February 23, 1981, when she again came to Dr. AZIMA for an abortion. She claimed her last menstrual period was six weeks prior and she exhibited breast tenderness and nausea. These symptoms were were consistent with her history of showing false signs of pregnancy. Her pregnancy test was again negative. (R. 436). To confirm that she was not pregnant Dr. AZIMA conducted a pelvic examination. He found her uterus normal and determined that it was not enlarged. (R. 439). The patient then requested another IUD which was inserted at that time. She returned for a March 5 follow-up visit at which time she again exhibited symptoms of pregnancy. (R. 439, R. 483). Both a pelvic exam and another pregnancy test administered on March 5 again confirmed that she was not pregnant. (R. 440, 483). Because the string of the IUD was not visible,

Dr. AZIMA sounded the uterus and thereby confirmed that the IUD was still in place. (R. 439).

To ease her concerns and keep abreast of the situation, Dr. AZIMA scheduled another appointment nine days later on Saturday, March 14, 1981. She did not return for that follow-up appointment. (R. 439, 483).

During the course of the 1981 treatment in question, Dr. AZIMA conducted two pregnancy tests, two physical examinations and two pelvic examinations, all of which showed no indication of pregnancy. (R. 439-440). He twice determined that her uterus was not enlarged, (R. 440), which is conclusive evidence that she was not pregnant at that time.

Dr. Yankopolus examined Ms. Schmidt nearly two months after she last saw Dr. AZIMA. (R. 198, 199). His records disclose

that Holli Schmidt did not tell him the truth. She told him that AZIMA had examined her as recently as the week before and that AZIMA put his hands in his pockets, shrugged his shoulders and could not explain her symptoms. (R. 199). Dr. Yankopolus did nothing to verify this erroneous story. (R. 200). Without conducting a test to assure that the IUD was still in place, Dr. Yankopolus advised her of the dangers of pregnancy with an IUD in place and counselled regarding an abortion. (R. 224, 225).

Dr. Yankopolus referred Ms. Schmidt to his partner, Dr. Waterman, in order to terminate the pregnancy. Two days later, without first confirming that the IUD was in fact present, Dr. Waterman performed an abortion on Ms. Schmidt on May 1, 1981. (R. 341).

Waterman testified that he did not specifically remember removing Holli

Schmidt's IUD and holding it up and showing it to her. "I do that routinely. Today I can't sit here and tell you that I did it on that particular day." Waterman altered Ms. Schmidt's medical records one year after the abortion to state that the IUD was removed on May 1, 1981. On cross-examination he admitted that his only basis for making the correction was an allegation by Schmidt that it had been removed. (R. 341).

B. DPR Testimony Against Dr. AZIMA.

(1) Dr. Yankopolus' Testimony.

The DPR presented the testimony of Dr. Yankopolus who stated that the procedure that he follows is to "make the determination that the patient is not pregnant for sure." "[M]ost often the device is inserted on a period...." (T-186).

Dr. Yankopolus testified that he administers either a urine or a blood pregnancy

test only if there is a doubt that the patient is not pregnant. (T-178-179). Therefore his standard respecting insertion of an IUD device is less protective than the standards adhered to by Dr. AZIMA who twice performed a pregnancy test on Holli Schmidt.

Dr. Yankopolus also testified that it was inappropriate for the IUD to have been inserted because of Ms. Schmidt's overt pregnancy signs and symptoms and because he did not know which type of pregnancy test Dr. AZIMA performed. It must be remembered, however, that Holli Schmidt had once before exhibited false pregnancy signs and Dr. AZIMA in this instance not only administered two pregnancy tests but also performed two pelvic examinations. (R. 439-440). Approximately eight weeks after Dr. AZIMA's examinations revealed no pregnancy, on April 27, 1981, Dr.

Yankopolus determined that Ms. Schmidt was pregnant.

(2) Dr. Waterman's Testimony

Dr. Waterman testified that Holli Schmidt conceived ten to twelve weeks prior to his May 1 examination of her. (R. 325).

On this basis he testified that it was inappropriate for Dr. AZIMA to insert the IUD because the patient could have been pregnant. (R. 326). But, on cross-examination he admitted that the medical standard by which he was judging Dr. AZIMA was not to be found any place in particular. Rather, it was based upon his own medical judgment and experience and could not be found in any published rules or standards (R. 329-330). Furthermore, Dr. AZIMA's unopposed testimony established that a woman may miss a period, have tenderness or enlargement of the breasts, gain weight, or even feel something

in her abdomen and yet not be pregnant. (R. 378-379).

C. Response to DPR Testimony.

(1) Dr. Yankopolus' Testimony

Dr. Yankopolus acknowledged that his diagnosis of Ms. Schmidt and critique of Dr. AZIMA were based in part upon the erroneous belief that Holli Schmidt had seen Dr. AZIMA the week before. (R. 201, 202). Dr. Yankopolus testified that Dr. AZIMA should have discovered the pregnancy the week prior to April 27, 1981, if she was twelve weeks pregnant when Yankopolus saw her on April 27, 1981. (R. 202). However, Dr. AZIMA did not see her after March 5, 1981.

Dr. Yankopolus further admitted that IUD's are only 96 percent effective as contraceptives, and he did not know whether Holli Schmidt fell in the remaining four percent who become pregnant while using an IUD. (R.

215). He testified that he heard a fetal heartbeat in Holli Schmidt which can be heard nine and one-half to ten weeks after conception. (R. 215). He also admitted on cross-examination that Holli Schmidt could have expelled the IUD (R. 222) and that there are tests that he could have performed but did not, in order to verify that the IUD was in place.

Regarding the urine pregnancy tests which Dr. AZIMA gave Holli Schmidt, Dr. Yankopolus first stated that some tests are "potentially" useless, because they are only 85 percent accurate but then acknowledged that other urine pregnancy tests are 96% accurate. (R. 220-221). He had no idea what kind of pregnancy test Dr. AZIMA twice gave to Holli Schmidt in 1981. (R. 221).

Dr. Yankopolus testified that he does not always do a pregnancy test before insert-

ing an IUD. (R. 223). Yet, even though Dr. AZIMA performed two pregnancy tests (in addition to two physical examinations and two pelvic examinations), Dr. Yankopolus testified that Dr. AZIMA was negligent. (R. 223-224). This unsupported testimony of Dr. Yankopolus discloses no substandard practice by Dr. AZIMA. Yet the hearing officer found that Petitioner violated §458.331(1)(t), Fla. Stat.

(2) Dr. Cowdin's Testimony

Dr. Cowdin testified that he has experience in prescribing and inserting IUDs and that he would "generally insert the IUD while the patient is on her menstrual period," because "it's technically easier to do so." (R. 247). Dr. Cowdin admitted that an IUD does not always prevent conception and he has actually delivered a baby whereupon an IUD was expelled during birth, indicating

that the IUD was not effective. (R. 291). He also acknowledged that an IUD can be involuntarily expelled. (R. 294).

When Dr. Cowdin was questioned about the two sets of tests that Dr. AZIMA had performed upon Schmidt -- pregnancy tests and pelvic examinations -- he responded that "there is nothing wrong with that." (R. 292).

When asked when Holli Schmidt became pregnant, he answered that "conception likely occurred in the neighborhood of February 15." (R. 293). While this might not have shown up on the pregnancy test which was given to Holli Schmidt on February 23 and again ten days later (R. 293), if Holli Schmidt had kept her March 14 appointment with Dr. AZIMA, a third pregnancy test would have revealed the pregnancy. (R. 293).

When asked what Dr. AZIMA did wrong, Dr. Cowdin responded, "I can't answer that. I don't know what he did to her." (R. 294).

At one point Dr. Cowdin, was asked: "Do you think that it is within the standard of care for a doctor to always do a pregnancy test before inserting an IUD?" He responded that it was a "question ... difficult to answer," and that it would depend on circumstances, and that those circumstances boiled down to a medical judgment by the doctor. (R. 295).

Notwithstanding a diagnosis by the Yankopolus group that Holli Schmidt was twelve to fourteen weeks pregnant, Dr. Cowdin acknowledged that on May 1, 1981, Dr. Waterman used a number nine cannula on Holli Schmidt -- a nine millimeter suction catheter (R. 296). Cowdin also acknowledged the authoritative character of the publication "Con-

temporary OB/GYN" (R. 297) and a chart correlating the size of the cannula with the size of the uterus and age of pregnancy.

Cowdin acknowledged that if the correlation procedure contained in the "Contemporary OB/GYN" chart was appropriate, then Holli Schmidt's pregnancy would have been nine weeks,[2] (R. 299-301), and therefore Ms. Schmidt was not pregnant when Dr. AZIMA inserted the IUD.

Dr. Cowdin, based upon the literature, "Contemporary OB/GYN" of October 1979, and the size of the cannula utilized by Waterman in her abortion, opined that Holli Schmidt conceived in the neighborhood of March 13, (R. 299- 300), nearly 3 weeks after the IUD was inserted by Dr. AZIMA on February

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[2]After performing the abortion, Dr. Waterman did not request a pathological examination to determine the age of the fetus. (T-281).

23. Dr. AZIMA last saw Ms. Schmidt on March 5. (R. 300).

The admission by Dr. Cowdin of the likelihood that Ms. Schmidt's pregnancy occurred after Dr. AZIMA last saw her, examined her and confirmed that her IUD was still in place on March 5, 1981, is cogent and convincing evidence that Dr. AZIMA did not fall below established standards by implanting the IUD on February 23, 1981. Moreover, no doctor testified that the IUD must be in place only during menstruation.

(3) Dr. Waterman's Testimony

Dr. Waterman was then asked what he would do if a woman came into his office, told him that she had an IUD but the string had disappeared, and that she might wish to terminate the pregnancy if the IUD was there. Waterman answered that he would order an ultrasound. However, he did not order an ultra-

sound prior to performing an abortion on Holli Schmidt. (R. 331).

Dr. Waterman admitted that he does not always do a pregnancy test before inserting an IUD, and in light of the fact that Dr. AZIMA did two pregnancy tests and scheduled a third one which Holli Schmidt never came back for, Dr. Waterman testified "I don't know" what Dr. AZIMA did wrong. (R. 337).

(4) Dr. AZIMA's Testimony

After DPR expert witnesses testified that the probable age of Holli Schmidt's pregnancy on April 27, 1981 was twelve to fourteen weeks, Dr. AZIMA testified at length, employing authoritative literature and drawing to scale on the blackboard for the benefit of the Hearing Officer, the impropriety of such a diagnosis. Uterine size at twelve weeks of pregnancy is comparable to a large apple, whereas uterine size at fourteen weeks

of pregnancy is comparable to a large grapefruit; so that OB/GYN's do not speak of "twelve to fourteen weeks," but rather speak in one-week increments. The difference between a twelve-week pregnancy and a fourteen-week pregnancy is gross and observable, and cannot be a proper span of measurement. (R. 398-406). It is medically unacceptable to diagnose a pregnancy as twelve to fourteen weeks, this being insufficiently precise to satisfy standards of medical practice. (R. 403).

Dr. AZIMA's unrebutted testimony as to these matters was based in part on his teaching as a clinical instructor at University Hospital, Maryland. (R. 406-407).

(5) Dr. Sibley's Testimony

Dr. Craig Sibley acknowledged on cross-examination that he diagnoses pregnancies in terms of being ten weeks, or nine

weeks, or eight weeks. (R. 154-155). Dr. Sibley also testified that he measures the age of a pregnancy from the first day of the last menstrual period. This differs by approximately two weeks from actual time of conception. (R. 155). This was contrary to the testimony of the Yankopolus group.

In support of Dr. AZIMA's procedures, Dr. Sibley, like the other expert witnesses, acknowledged that the urine pregnancy test is a reasonable way to determine whether the patient is pregnant (R. 170-171). He also acknowledged that missing a menstrual period is not proof of pregnancy; that breast tenderness is not proof of pregnancy, and that a physician who performs pregnancy tests, pelvic examinations and takes a history, has performed reasonably. (R. 170-171). Doing it twice is even more reasonable. (R. 171).

(6) Conclusions

Dr. AZIMA's procedure for inserting the IUD in Holli Schmidt deviated in no way from the standards of the American College of Obstetricians and Gynecologists, nor from any other standards published or otherwise. (R. 440). There is no standard that requires insertion of an IUD only during the menstrual period. (R. 442).

Within reasonable medical certainty, Holli Schmidt was not pregnant when she visited Dr. AZIMA on February 23, 1981. (R. 440). Within reasonable medical certainty, Holli Schmidt was not pregnant when she visited Dr. AZIMA on March 5, 1981. (R. 440). Even if, arguendo, she was pregnant at that time, certainly Dr. AZIMA's two pregnancy tests and two pelvic examinations are sufficient to absolve him from any claim of medical negligence.

4. Case History and Testimony on Christine Sellers Kuchar

(Count I of the March 15, 1983, Complaint)

A. Case History of Ms. Kuchar

Dr. AZIMA was disciplined specifically for not having sent the aborted tissue specimen to a pathology laboratory for a detailed examination, and for not having determined her Rh factor.

Christine Kuchar, formerly Christine Sellers, came to Dr. AZIMA on February 19, 1981, for an abortion. (R. 52, 430, 467-469). She had been told two weeks earlier by Dr. Carver, her attending physician at the Ft. Myers Community Hospital Emergency Room, that she was pregnant. (R. 52, 53, 430, 431, 606). She did not, however, inform Dr. AZIMA that she had previously seen Dr. Carver and had been diagnosed pregnant. (R. 441). Not only did she fail to tell Dr. AZIMA that she had

previously seen Dr. Carver, but she also failed to inform him that she had a suspected ectopic pregnancy[3] five years earlier, which she also discussed with Dr. Carver on February 18. (R. 23, 66, 68, 74, 76, 84, 94, 606). Both of these pieces of information were very important and would have greatly facilitated Dr. AZIMA's ability to treat her under the circumstances. If. Dr. AZIMA had been told by Ms. Sellers that she had a prior suspected ectopic pregnancy, then having identified recognizable fetal parts in the tissue he removed from her uterus, he would have

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[3]An ectopic pregnancy occurs when a fertilized egg implants and grows outside of the uterus; in most cases it implants and matures in the fallopian tube and almost always leads to rupture and removal of the fallopian tube. (R. 146, 206, 343).

been put on notice of the possibility of a combined pregnancy.[4]

She did tell Petitioner that her last menstrual period was January 4, 1981 which made her seven weeks pregnant. (R. 431). Her pelvic examination disclosed that her uterus was six or seven weeks in size. Dr. AZIMA provided a suction curettage and paracervical block with one per cent Xylocaine. After performing the abortion, Dr. AZIMA made a detailed visual inspection of the products of conception and determined that he had, in fact, successfully terminated a pregnancy. There were clearly recognizable fetal parts in the tissue. (R. 35, 468, 469). She was given an antibiotic and an appointment was

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[4]A combined or dual pregnancy occurs when two eggs are fertilized and one implants in the uterus while the other, at the same time, implants in the fallopian tube. Thus, a woman has two viable fetuses inside of her at the same time. (R. 146, 147, 209, 249, 320, 335).

made for her to return in one week. (R. 431-432). Ms. Kuchar did not return.

Ms. Kuchar never conferred or talked with Dr. AZIMA after the procedure on February 19. (R. 59). One week after the February 19 meeting with Dr. AZIMA, she went to Dr. Cowdin's office. (R. 60). She testified that Dr. Cowdin was very upset that she had not received a shot of RhoGam after the abortion was performed. She testified also that she knew that if one had an Rh factor one is supposed to have a shot of RhoGam -- having learned that with the birth of her first child. (R. 61). Although she purported to have known this, she refused RhoGam during her February 19 visit with Dr. AZIMA.

One week or less after seeing Dr. Cowdin, she awakened with pain in her lower abdomen, went to Dr. Cowdin's office, and was informed that she had an ectopic or tubal

pregnancy. (R. 62). She was taken to Lee Memorial Hospital and had her right fallopian tube, which had ruptured, removed. (R. 63). She has recovered and has had no problems since. (Id.)

The record reveals without contradiction that Ms. Kuchar had an ectopic pregnancy which required an operation approximately two weeks after Petitioner performed the termination procedure. (R. 62).

B. Testimony in Response to DPR Charges.

Dr. AZIMA testified that he definitely asked Ms. Sellers what her Rh factor was, and she told him that it was Rh negative. (R. 432). He then testified that he asked her if she wanted a shot of RhoGam, which is administered to Rh negative patients who contemplate future pregnancies, and she replied no since she intended to have her tubes tied. (R. 433).

While Ms. Sellers testified that no one at Dr. AZIMA's office asked her what her blood type was (R. 61), she never, in any way, contradicted Dr. AZIMA's testimony that she refused the shot of RhoGam. What is so telling about this is that the only reason for administering RhoGam is to prevent the sensitization of an Rh negative patient. It is only called for if a patient is Rh negative. (R. 133, 244, 245). So, why did Dr. AZIMA ask Ms. Sellers if she desired a shot of RhoGam? The answer is self-evident -- he knew she was Rh negative. (R. 210, 333, 432). This logical conclusion is uncontradicted by the testimony and the record.

Because Ms. Kuchar is Rh negative, she was counselled that she might want RhoGam. RhoGam is only necessary if "the patient is considering further pregnancies." (R. 415). RhoGam is not necessary if the patient does

not desire future pregnancies or wishes sterilization. (R. 416). Since RhoGam is not 100 percent effective and has some harmful side effects (R. 416-417), Dr. AZIMA counsels Rh negative patients, and allows them to make their own informed decision as to whether to take the RhoGam, which they may refuse. (R. 417).

The DPR's medical witnesses testified that blood type must be determined, but acknowledged that it need not always be determined by the drawing of blood. Regarding Ms. Kuchar, it was acknowledged that Dr. Cowdin accepted history (R. 267) and it was acknowledged by the other DPR medical witnesses that this may be reliable. Dr. AZIMA testified that he determined blood type in every case, that he determined from her history that she was Rh negative and she refused RhoGam because she wanted to be sterilized. (R. 433).

This procedure has not been demonstrated to be in violation of any medical standard, rule, statute, or other medical protocol.

It is established by the medical evidence herein that an ectopic pregnancy may be difficult to detect, and that the only sure method of detection is exploratory surgery which is not ethically recommended as a matter of course.

In order for Ms. Kuchar to have been found suffering an ectopic pregnancy two weeks after Dr. AZIMA performed a termination procedure, one of two possible events must have occurred. Either Petitioner did not successfully terminate the pregnancy on February 19, 1981 because it was ectopic, or Ms. Kuchar had a combined pregnancy, i.e. two eggs were fertilized, where one egg implanted in a fallopian tube and the other developed in her uterus. (R. 146).

If there was only one fertilized egg then it must have resided in the fallopian tube and Petitioner's termination procedures would not have been successful. The existence of only one egg would have necessarily been evident by an inability to identify fetal remains in the uterine product. However, Dr. AZIMA did clearly identify fetal parts in the products of conception (R. 435), thus indicating a combined ectopic pregnancy, such having a rare occurrence of approximately one in 30,000. (R. 209, 265, 320). Furthermore, had Petitioner been told by Ms. Kuchar that she had a prior suspected ectopic pregnancy, he would have been on notice of the possibility of a combined pregnancy when he performed her abortion. (R. 261, 262). Had Kuchar told Drs. Cowdin and AZIMA that she had a possible tubal pregnancy five years before (R. 261-62), it would have made a dif-

ference because of the significantly higher recurrence rate for women who have had ectopic pregnancies. (R 261-62). Having observed fetal remains there was nothing to be gained by sending the products of conception for further pathological examination. (R. 168, 265).

Dr. AZIMA followed his standard procedures with Ms. Kuchar. (T-432). He obtained her patient history. She told him she was Rh negative. He offered her RhoGam, but was told by her that she wanted her tubes to be tied (permanent sterilization), (R. 98,99), and she therefore refused the RhoGam. (R. 432-433). Had the patient returned in one week as scheduled, a pregnancy test would have been administered and would without doubt have revealed her ectopic pregnancy. (R. 433). Dr. AZIMA committed no acts of either omission or commission which in any

way deviated from the standard procedures about which he testified (R. 433-434). Nor did he do anything that would diverge from the published standards of the American College of Obstetricians and Gynecologists. (R. 434).

Dr. AZIMA completed the abortion procedure on Ms. Kuchar on February 19, 1981 and inspected the products of conception in detail. (R. 435). In that inspection no abnormality or irregularity was found. There was no published standard by either the American College of OB/GYN's or the Florida Medical Association nor was there any rule or reason which required him to send those particular products for further pathological examination. (R. 435-436). He was, however, suspended specifically for failing to send those products for pathological examination based sole-

ly upon the testimony of interested physicians.

C. Regarding Ms. Kuchar.

On direct examination, Ms. Kuchar denied the accuracy of the February 18, 1981, date on her hospital record (R. 606, 84) and, therefore, her credibility was significantly impeached.

On cross-examination the witness acknowledged her name and the date on the hospital records (R. 66, 67), as well as the name of a witness, but declared that the records are wrong. (R. 64, 65). Having testified that the witness, Dr. Carver and the hospital made a mistake but she did not (R. 68), she then contradicted Dr. Cowdin's records by denying that she had told him that she had an ectopic pregnancy five years before. (R. 68).

Ms. Kuchar admitted that when Dr. Cowdin saw her, one week after Dr. AZIMA performed the abortion, Dr. Cowdin did not discover the ectopic pregnancy. (R. 74). Nor did Dr. Carver discover it on February 18. (R. 74).

Ms. Kuchar stated she was not upset that Dr. Cowdin had missed her ectopic pregnancy when she first went to him, although he did not give her a pregnancy test to confirm that Dr. AZIMA's abortion had been effective. (R. 78-79). Ms. Kuchar denied that Dr. Cowdin said that he was working with DPR to get Dr. AZIMA and that the DPR agent said that he was working with Dr. Cowdin to get Dr. AZIMA (R. 78-79), but was impeached by her deposition of November 4, 1983 when she had so testified. (R. 80-81).

Ms. Kuchar's hospital records of February 18, 1981 indicate that she told Dr.

Carver about an ectopic pregnancy five years prior; but in her deposition of November 4, 1983 she denied any pregnancies between 1973 and February 1981 and denied any ectopic pregnancies. (R. 82). She also denied any miscarriages and any "female trouble" between 1973 and 1981. When confronted with her November 4, 1983, deposition, she acknowledged having said that but tried to explain that she thought she had not had a tubal pregnancy after all. (R. 83). She was further impeached by her November 4, 1983 deposition where she denied having been to any emergency rooms. (R. 82-84).

Ms. Kuchar admitted that she had not told Dr. AZIMA that she might have had a tubal pregnancy five years prior because she did not think it was an important factor. (R. 84).

Ms. Kuchar's testimony materially contradicted her prior depositional testimony, her medical records in the Yankopolus group's office and her hospital records. (R. 85-86). She was also impeached by her February 24, 1982, deposition wherein she was asked whether she scheduled an appointment with Dr. AZIMA for a week after the abortion and answered, "No, I didn't." (R. 88). Yet, at the hearing she testified that before she left Dr. AZIMA's clinic she did schedule another appointment for the next week. (R. 87). When asked about these contradictory positions and why she had given the answers she had, she replied: "I don't know." (R. 88).

Although three doctors, Carver, AZIMA and Cowdin, all failed to diagnose the ectopic pregnancy, the witness testified that Dr. Azima was the only one who was negligent in not discovering it. (R. 94). Ms. Kuchar

continues to this day to see the Yankopolous group for treatment. (Id.).

5. Case History and Testimony Relating to Darlene Baker

(Count I of the August 2, 1983, Complaint)

Dr. AZIMA was disciplined specifically for not having sent Ms. Baker's aborted tissue specimen to a pathology laboratory for a microscopic examination.

Dr. AZIMA first saw Darlene Baker on January 12, 1981. (R. 422). She was then a 31-year-old married female with two full-term deliveries, no premature births, one abortion and one spontaneous or induced termination. Her last menstrual period was unknown and she was on the birth control pill. Her physical examination was noted as normal. Her pelvic examination disclosed a uterus of eight to nine weeks size. (R. 423). He performed a termination of pregnancy, and the details of

this procedure regarding Darlene Baker are in the record. (R. 425). Darlene Baker, like Ms. Kuchar and Ms. Schmidt, did not return for her one-week follow-up appointment. (Id.)

On December 23, 1982, approximately two years later, she returned and was given a pregnancy test that showed positive. She asked for another abortion. (Id.) Dr. AZIMA determined that she was ten weeks pregnant. (R. 427).

During the 1982 visit Petitioner scrupulously followed his standard procedures with Ms. Baker. The uterine tissue which was visually inspected was consistent with an eleven week old fetus. (R. 427). There was no abnormality in that tissue (R. 427-428). Having noted clearly recognizable fetal parts and noting no abnormality, Dr. AZIMA then disposed of the tisse in a manner which was

in full compliance with all of the applicable standards and regulations.

During her 1982 visit, Ms. Baker also requested an IUD and scheduled an appointment to have the device inserted the next week. She, however, did not return for her follow-up visit. (R. 428).

Ms. Baker complained about her treatment because two months after her abortion she awakened in a pool of blood and could think of no other reason for it than the abortion. (R. 43-44). There is no evidence that the abortion procedures utilized by Dr. AZIMA were in any way related to the bleeding Ms. Baker experienced two months later.

The testimony of Dr. AZIMA is confirmed by the medical record, being DPR's Exhibit "A", (R. 462-466), and is uncontradicted.

6. Testimony Regarding The Standards For Obstetric & Gynecological Services.

Regarding the charge that Dr. AZIMA failed to meet accepted standards or engaged in gross or repeated malpractice by failing to send all fetal remains out for a detailed pathological examination, there are no OB/GYN protocols or standards for the Lee County Medical Society, nor were there any in 1981 or 1982. (R. 355- 356).

Dr. AZIMA scrupulously followed the published American College of OB/GYN standards as a matter of standard procedure and as to the patients referenced herein, did make a close and detailed examination of the tissue and clearly noted fetal parts.

He is sufficiently trained and competent to make such an examination. (R. 412). The standards explain that an OB/GYN specialist must examine the specimen that he has

removed in order to be fully familiar with the pathology of what he has obtained. (R. 412).

If Dr. AZIMA is certain that fetal parts have been removed, he disposes of the uterine product. This fully comports with all Florida state regulations and statutes regarding the disposal of such tissue. If there are any doubts, he sends the specimen to the pathologist for examination. (R. 412). There is no requirement by any standard to send every specimen to pathology. (R. 413). The witnesses were in significant conflict with one another on this point.

As to the standards of the profession, i.e., either what OB/GYN's in fact do or ought to be doing, Dr. Sibley only knew what four others do. (R. 161). The four others are the Yankopolus group practice. (R. 162). That is "the same standard as

mine." (R. 162). But Dr. Waterman acknowledged that there are places that do not send out tissues for pathological examination and that there is no law that requires this. (R. 318).

Dr. Sibley testified that a number of licensed clinics in the State of Florida do not send out fetal parts to pathology. (R. 157-158). He acknowledged that sending the products of conception to a laboratory is done "primarily to protect us and the clinic. A lot of clinics do not do it; our clinics happen to do it." (R. 157-58). In Dr. Sibley's opinion, not sending the products to pathology does not constitute malpractice. (R. 158). Neither does any rule of law or rule of the medical examiners of the State of Florida require that those products be sent to pathology (R-159).

A. Yankopolus Testimony.

Dr. Yankopolus admitted that he was not competent or capable of examining the products of conception visually. (R. 231). When asked about the standards for obstetric and gynecological services published by the American College of Obstetricians and Gynecologists, he wasn't sure whether he had seen them, but acknowledged that it is an authoritative work and is the standard of his profession. (R. 231).

The 1982 publication of the Standards of the American College of Obstetricians and Gynecologists reports at page 52 that "in a situation of selective termination of pregnancy, a physician should record a description of the gross products definitely being identified as products of elective interruptions, and if not easily identifiable, they

must be submitted to a pathologist for gross and microscopic examination." (R. 231-232).

Nevertheless, evidencing the tenor of his testimony, Dr. Yankopolus -- who declared himself to be incompetent to make such an examination -- declared that he is "above the standards" of the American College. (R. 232).

B. Cowdin Testimony

Dr. Cowdin also testified that it falls below the standards of the profession if the remains of the abortion are not sent to pathology. (R. 271). Yet he was impeached by his deposition of March 23, 1982 (R. 268). When he was asked specifically whether he knew of any "professional obligation, not legal obligation" to send the products to pathology, and answered "No." (R. 271). Dr. Cowdin disagreed with the earlier testimony

of Dr. Sibley that a lot of clinics do not send the remains to pathology. (R. 273).

Dr. Cowdin's credibility was also called into question when he testified that it falls below the accepted standard of care not to record what the products of conception were (R. 274), but that he does not always record them. (Id.) He records a description of the products if he feels there is something unusual, but does not if he feels there is nothing unusual. (R. 275).

6. Conclusion

It is not contested in the record that Dr. AZIMA clearly satisfied the established standards of the American College of Obstetricians and Gynecologists.

The DPR has failed to prove by competent substantial evidence that Dr. AZIMA engaged in gross or repeated malpractice or fell below minimally acceptable medical stan-

dards through his procedures regarding the products of conception. Nor did the DPR provide competent substantial evidence to disprove that Dr. AZIMA determined Ms. Kuchar's Rh factor and offered her RhoGam.

85-1757 (3)

Supreme Court, U.S.
FILED
MAY 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ALI A. AZIMA, M.D., PETITIONER,

v.

FLORIDA DEPARTMENT OF
PROFESSIONAL REGULATION,
BOARD OF MEDICAL EXAMINERS,
RESPONDENT.

SUPPLEMENT TO SECTION II OF THE APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOR THE FIRST DISTRICT OF FLORIDA

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APP

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DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32301

Telephone No. (904) 488-6152

DATE August 26, 1985

CASE NO BE-368

ALI A. AZIMA

Appellant/Petitioner

vs

DEPARTMENT OF PROFESSIONAL REGULATION

Appellee/Respondent

ORDER

Motion for rehearing is DENIED.

By Order of the Court

RAYMOND E. RHODES, CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following: Bernard H. Dempsey, Jr., Esquire, Orlando, Florida; Richard Lee Barrett, Esquire, Orlando, Florida; Spiro T. Kypreos, Esquire, Tallahassee, Florida; J. Riley Davis, Esquire, Tallahassee, Florida; Don D. Dye, Esquire, Tallahassee, Florida

_____
Deputy Clerk

SUPREME COURT OF FLORIDA

Friday, January 24, 1986

ALI A. AZIMA, M.D.,

Petitioner,

v. CASE NO. 67,678

DEPARTMENT OF PROFESSIONAL REGULATION, District Court of Appeal, First District No. BE-368

Respondent.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

ADKINS, Acting C.J., OVERTON, MCDONALD, EHRLICH and SHAW, J.J., concur

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Betsy Hill
Deputy Clerk

cc: Hon. Raymond E. Rhodes, Clerk

Richard Lee Barrett, Esquire

William M. Furlow, Esquire

J. Riley Davis, Esquire

Supreme Court, U.S.
FILED
JUN 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1757

In The

Supreme Court of the United States

October Term, 1985

ALI A. AZIMA,

Petitioner,

v.

FLORIDA DEPARTMENT OF PROFESSIONAL REGULATION-BOARD OF MEDICAL EXAMINERS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOR THE FIRST DISTRICT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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Susquehanna Boom Co. v. West Branch Boom Co., 110 U.S. 57, 3 S.Ct. 438 (1884) 6

Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889 (1981) 6

Wilson v. Cook, 327 U.S. 474, 66 S.Ct. 663 (1946) 6

STATUTES CITED

Chapter 455, Florida Statute 1

Chapter 458, Florida Statute 1

Section 458.331(1)(t), Florida Statutes 3, 4, 6

Section 768.45, Florida Statutes 2

ISSUE

The Respondent, Florida Department of Professional Regulation—Board of Medical Examiners, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Florida First District Court of Appeal's opinion in this case. That opinion is reported at 473 So. 2d 761 (1985).

———o———

STATEMENT OF THE CASE

The Respondent accepts Petitioner's Statement of the Case as same relates to Petitioner's Summary of Findings and recommendations contained under subheading A. of Petitioner's Petition for Certiorari.

The Respondent is authorized and empowered under Chapters 455 and 458, Florida Statutes, to investigate the medical practices of any medical doctor licensed under Chapter 458, Florida Statutes, and to take administrative action against any medical doctor determined to have violated Chapter 458, Florida Statutes. Pursuant to this authority, Respondent filed administrative charges against Petitioner alleging that Petitioner's actions on several occasions violated Section 458.331(1)(t), Florida Statutes, which provides:

> 458.331(1) The following acts shall constitute grounds for which disciplinary actions specified in sub-section (2) may be taken:
>
> * * *

> (t) gross or repeated malpractice *or* the failure to practice medicine with that level of care, skill and treatment, which is *recognized by a reasonably prudent similar physician* as being acceptable under similar conditions and circumstances. The Board shall give great weight to the provisions of [Section] 768.45 [Florida Statutes] when enforcing this paragraph. (*emphasis added*) (See full text of Section 768.45 in Respondent's Appendix).

Respondent charged Petitioner with providing substandard care to several of his patients being treated at his clinic in Ft. Myers, Florida. The charges related to the method and procedures used by Petitioner in performing pregnancy terminations and providing birth control services.

Four physicians, all specialists in obstetrics and gynecology (as was Petitioner) and all of whom provide pregnancy terminations and birth control services, testified against Petitioner. These four physicians all practice within the Ft. Myers community, as did Petitioner, at the time Petitioner treated the patients in question. The record reveals that there were six physicians performing pregnancy terminations outside of a hospital setting in the Ft. Myers community at the time of the hearing on Respondent's charges against Petitioner. (see opinion of the District Court of Appeal, 473 So.2d at 761 at 762 n1). Petitioner was one of these six physicians. Four of the remaining five physicians testified against Petitioner at the hearing. *No physician testified on behalf of Petitioner.*

Petitioner's primary position has been that he conducted his practice in full compliance with the published American College of Obstetrics and Gynecology Standards. At the hearing, Petitioner placed great reliance on

reading from this treatise. However, the text was never introduced into the record, was not subject to cross examination and Petitioner's reading of selected passages was not corroborated by any expert testimony. Consequently, this text amounted to virtually meaningless hearsay. At most, the reading from such a text could merely affect the weight to be given to the testimony of an expert witness on behalf of the Petitioner. But the Petitioner offered no expert testimony, therefore the evidentiary weight of the American College of Obstetrics and Gynecology Standards text is nil in this instance. The hearing officer rightly accorded little weight to the text, and accepted the expert testimony of the four physicians presented by Respondent in determining that Petitioner had violated Section 458.331(1)(t), Florida Statutes.

This weighing of the evidence in favor of Respondent predicated Petitioner's filing of exceptions to the hearing officer's Recommended Order before the Board of Medical Examiners, and subsequently was the basis of Petitioner's Appeal to the Florida First District Court of Appeal following the Board's acceptance of the hearing officer's recommendation.

Contrary to the assertions of Petitioner, the federal constitutional questions presented for this Court's review were never raised before the hearing officer in the administrative hearing, the Board of Medical Examiners, or the Florida First District Court of Appeal. The sole issue presented for consideration by the hearing officer and the Board, and the only question presented to the District Court of Appeal was:

THE DEPARTMENT OF PROFESSIONAL REGULATION FAILED TO PRESENT COMPETENT SUBSTANTIAL EVIDENCE THAT [PETITIONER] VIOLATED SECTION 458.331(1)(t), FLORIDA STATUTES.

The hearing officer, the Board, and District Court of Appeal all rejected Petitioner's assertion that Respondent lacked competent substantial evidence that Petitioner's actions violated Section 458.331(1)(t), Florida Statutes, but were never asked to address the federal constitutional challenge to that statutory provision which Petitioner now brings before this Court.

REASONS WHY PETITION SHOULD BE DENIED

1. The federal constitutional questions Petitioner brings to this Court were never raised in the state courts below.

Petitioner comes before this Court with a prayer for the invalidation of Section 458.331(1)(t), Florida Statutes, as being repugnant to the 14th Amendment to the United States Constitution. Petitioner's prayer is grounded upon an assertion of constitutional infirmity not previously brought before a Florida court. In so doing, Petitioner would have this Court ignore precedent (cited infra) and issue a writ of certiorari to decide the fate of a state law, upon a federal question which Petitioner has not afforded the Florida courts an opportunity to address.

Petitioner seeks this writ following a decision by the Florida First District Court of Appeals (hereinafter DCA) which affirmed an Order by the Florida Board of Medical Examiners (BOMEX) imposing disciplinary sanctions

against Petitioner for violation of the challenged statute. In his appeal of the BOMEX Order, to the DCA, Petitioner questioned the sufficiency of the evidence presented against him upon which the BOMEX based its Order. The DCA decision did not speak to the federal question which Petitioner now raises.

The failure of a state court to speak to federal questions has been held presumptive of a failure to have raised those questions before the state court. "This Court has stated that when . . . the . . . state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation to the state courts . . .", *Fuller v. Oregon*, 417 U.S. 40 at 50 n.11, 94 S.Ct. 2116 at 2123 n.11 (1974) quoting *Street v. New York*, 394 U.S. 576 at 582, 89 S.Ct. 1354 at 1360 (1969). Here, the record of Petitioner's appeal to the DCA supports the presumption of Petitioner's failure to present the federal questions to the Florida courts.

Petitioner's casual remarks in his brief before the DCA (see pages 63-71 in Petitioner's Appendix), which Petitioner represents as the portion of the record demonstrating that both federal questions were timely and properly raised in that court, make no reference to the 14th Amendment and very clearly did not frame any constitutional questions for the DCA to decide. "Certainly [they] cannot be found in the record in the form [they have] been stated in the brief of counsel here." *Church v. Kelsey*, 121 U.S. 282 at 283, 7 S.Ct. 897 at 898 (1887). Where an appeal from a decision by a state court comes on a writ of certiorari, the United States Supreme Court can only consider the federal questions passed upon by the state court,

Wilson v. Cook, 327 U.S. 474 at 482, 66 S.Ct. 663 at 667, and it is incumbent upon Petitioner to show that " . . . an explicit and timely insistance [was made] in the state courts that a state statute, as applied, is repugnant to the federal constitution . . .", *Charleston Federal S&L Assn. v. Alderson,* 324 U.S. 182 at 185, 65 S.Ct. 624 at 625 (1945). Petitioner has failed to show that the federal questions he now raises were explicitly presented in any state court.

Where it appears nowhere in the record that the federal questions were raised or presented below, the fact that Petitioner now raises those questions after the final state court decision does not confer jurisdiction on the United States Supreme Court. *Susquehanna Boom Co. v. West Branch Boom Co.,* 100 U.S. 57, 3 S.Ct. 438 (1884). *Simmerman v. Nebraska,* 116 U.S. 54, 6 S.Ct. 333 (1885). To give the United States Supreme Court jurisdiction to revise the judgment of a state court it must appear that the point on which Petitioner relies was made in the state court and decided against him, and that the section of the federal constitution upon which Petitioner relies was brought before the state court. *Santa Cruz County v. Santa Cruz R.R.,* 111 U.S. 361, 4 S.Ct. 474 (1884). Petitioner has not met this requirement.

This Court recently held that before it can take jurisdiction to reexamine the final judgement of a state court, the state court must be afforded an opportunity to respond to a federal constitutional challenge to a state statute. *Webb v. Webb,* 451 U.S. 493, 101 S.Ct. 1889 (1981). The DCA was not afforded an opportunity to respond to the constitutional challenge to section 458.331(1)(t), Florida Statutes, which Petitioner now brings to this Court.

To grant this petition, and issue a writ of certiorari on the basis of the federal questions presented here for the first time by Petitioner would require this Court to ignore overwhelming authority to th econtrary, and to undermine a fundamental tenet of our system of federalism. Accordingly, the writ of certiorari here prayed for should be denied.

———o———

CONCLUSION

Petitioner failed to raise any federal questions in the state courts below, therefore he cannot now bring these federal questions to the United States Supreme Court.

Respectfully submitted,

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Counsel for Respondent

APPENDIX

Section 768.45, Florida Statutes:

(1) In any action for recovery of damages based on the death or personal injury of any person in which it is alleged that such death or injury resulted from the negligence of a health care provider as defined in s.768.50(2)(b), the claimant shall have the burden of proving by the greater weight of evidence that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider. *The prevailing professional standard of care for a given health care provider shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.*

(2)(a) If the health care provider whose negligence is claimed to have created the cause of action is not certified by the appropriate American board as being a specialist, is not trained and experienced in a medical specialty, or does not hold himself out as a specialist, a "similar health care provider" is one who:

1. Is licensed by the appropriate regulatory agency of this state;

2. Is trained and experienced in the same discipline or school of practice; and

3. Practices in the same or similar medical community.

(b) If the health care provider whose negligence is claimed to have created the cause of action is certified by

the appropriate American board as a specialist, is trained and experienced in a medical specialty, or holds himself out as a specialist, a "similar health care provider" is one who:

1. Is trained and experienced in the same specialty; and

2. Is certified by the appropriate American board in the same specialty.

However, if any health care provider described in this paragraph is providing treatment or diagnosis for a condition which is not within his specialty, a specialist trained in the treatment or diagnosis for that condition shall be considered a "similar health care provider."

(c) The purpose of this subsection is to establish a relative standard of care for various categories and classifications of health care providers. Any health care provider may testify as an expert in any action if he:

1. Is a similar health care provider pursuant to paragraph (a) or paragraph (b); or

2. Is not a similar health care provider pursuant to paragraph (a) or (b) but, to the satisfaction of the court, possesses sufficient training, experience, and knowledge as a result of practice or teaching in the specialty of the defendant or practice or teaching in a related field of medicine, so as to be able to provide such expert testimony as to the prevailing professional standard of care in a given field of medicine. Such training, experience, or knowledge must be as a result of the active involvement in the practice or teaching of medicine within the 5-year period before the incident giving rise to the claim.

(3)(a) If the injury is claimed to have resulted from the negligent affirmative medical intervention of the health care provider, the claimant must, in order to prove a breach of the prevailing professional standard of care, show that the injury was not within the necessary or reasonably foreseeable results of the surgical, medicinal, or diagnostic procedure constituting the medical intervention, if the intervention from which the injury is alleged to have resulted was carried out in accordance with the prevailing professional standard of care by a reasonably prudent similar health care provider.

(b) The provisions of this subsection shall apply only when the medical intervention was undertaken with the informed consent of the patient in compliance with the provisions of s. 768.46.

(4) The existence of a medical injury shall not create any interference or presumption of negligence against a health care provider, and the claimant must maintain the burden of proving that an injury was proximately caused by a breach of the prevailing professional standard of care by the health care provider. However, the discovery of the presence of a foreign body, such as a sponge, clamp, forceps, surgical needle, or other paraphernalia commonly used in surgical, examination, or diagnostic procedures, shall be prima facie evidence of negligence on the part of the health care provider.

(5) The legislature is cognizant of the changing trends and techniques for the delivery of health care in this state and the discretion that is inherent in the diagnosis, care, and treatment of patients by different health

care providers. The failure of a health care provider to order, perform, or administer supplemental diagnostic tests shall not be actionable if the health care provider acted in good faith and with due regard for the prevailing professional standard of care. (*Emphasis added.*)